



AIA® Document A133™ – 2009

Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

AGREEMENT made as of the day of in the year Two Thousand Thirteen (2013)
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status and address)

City of Frisco, Texas
6101 Frisco Square Blvd.
5th Floor
Frisco, TX 75034
Attn: George Purefoy, City Manager
(see address for notice purposes in **Exhibit B**)

and the Construction Manager:
(Name, legal status and address)

To be determined
(see address for notice purposes in **Exhibit B**)

for the following Project:
(Name and address or location)

ARBJ File: Frisco 870008 0644 Stadium Project
Stadium Tract Facilities

The Architect:
(Name, legal status and address)

M. Arthur Gensler Jr. & Associates, Inc.
Two Lincoln Centre
5420 LBJ Freeway, Suite 1100
Dallas, TX 75240
(see address for notice purposes in **Exhibit B**)

The Owner's Designated Representative:
(Name, address and other information)

See **Exhibit B**.

ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

The Construction Manager's Designated Representative:

Init.

(Name, address and other information)

| See **Exhibit B.**

The Architect's Designated Representative:
(Name, address and other information)

| See **Exhibit B.**

The Owner and Construction Manager agree as follows.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 The Contract Documents

§ 1.1.1 The Contract Documents consist of this Agreement, the AIA A201-2007 General Conditions of the Contract for Construction as modified by the Owner and the Construction Manager (referred to herein as the "General Conditions"), Supplementary and other Conditions (if any) identified in this Agreement, Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein.

Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal (the "GMP Proposal"), the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. All sections of the Project Manual shall be a part of the Contract Documents, including the bid proposal form signed by the Construction Manager, and the Request for Proposals.

The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. Where reference is made in this Agreement or the Contract Documents to the AIA Document A201-2007, General Conditions of the Contract for Construction ("A201-2007" or the "General Conditions"), the reference refers the version of the AIA Document 201-2007 as modified by the Owner and the Construction Manager (identified as the "Contractor" therein).

§ 1.1.2 If, and to the extent of, any inconsistency, ambiguity, or discrepancy in the Contract Documents, precedence shall be given to the Contract Documents in the following order of priority: (1) written Modifications issued after execution of this Agreement, including the GMP Amendment, with the Modification bearing the latest date taking precedence; (2) this Agreement, including the exhibits attached hereto and incorporated fully herein, but not including the General Conditions; (3) Addenda issued prior to the execution of this Agreement, with the Addenda bearing the latest date taking precedence; (4) the General Conditions; (5) the Final Drawings and Specifications; and (6) the Preliminary Drawings and Specifications, with those bearing the latest date taking precedence. Without limiting the foregoing, the terms of the Agreement and the General Conditions shall control over any terms in the Drawings or Specifications inconsistent therewith.

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§ 1.1.3 A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, (4) or a Minor Change Directive issued by the Owner in accordance with Section 7.4 of the General Conditions. Unless specifically enumerated in this Article 1 above, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Construction Manager's bid or proposal, or portions of Addenda relating to bidding requirements.

§ 1.2 Relationship of the Parties

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner and Blue Star and their project representatives and the Architect and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

§ 1.3 General Conditions

For the Preconstruction Phase, the General Conditions shall apply only as specifically provided in this Agreement. For the Construction Phase, the General Conditions of the Contract shall be as set forth in A201-2007, as modified by the parties hereto (the General Conditions as identified in Section 1.1 above). The term "Contractor" as used in the General Conditions shall mean the Construction Manager.

§ 1.4 Owner's Construction Consultant (Blue Star)

§ 1.4.1 Owner has retained the services of Blue Star Stadium, Inc. ("Blue Star") as a consultant in connection with the design and construction of the Project. Blue Star also has certain rights arising under this Contract as further described in Article 2 of the General Conditions.

§ 1.4.2 Construction Manager shall deliver to Blue Star accurate, complete copies of all notices or written communications given by the Construction Manager to the Owner, including but not limited to all such notices or communications required to be given by the Contract Documents, prior to or simultaneously with the delivery to the Owner. Notice provisions in the Contract Documents that are silent with regard to notice to Blue Star shall not be construed to mean that notice is not required to be given to Blue Star, even though specific provisions expressly require notice to Blue Star. No notice required to be provided to the Owner under the Contract Documents shall be effective until and unless also delivered to Blue Star. All meetings, conferences, and consultations between Owner and Construction Manager shall include Blue Star.

§ 1.4 DEFINITIONS

§ 1.4.1 The following terms as used in the Contract Documents shall have the meanings set forth below:

- .1 "Agreement" – this AIA® Document A133 – 2009, Standard Form of Agreement between Owner and Construction Manager (where the Construction Manager is also the Constructor), as modified by the parties and executed below, together with the Exhibits listed in Section 11.5.1 and attached hereto.
- .2 "Applicable Law" or "Applicable Laws" -- all laws, statutes, ordinances, regulations, guidelines or requirements now in force or hereafter enacted by any applicable Governmental Authority relating to or affecting the Project or arising from the Construction Contract, including, if and as applicable (1) the United States Occupational Safety and Health Administration requirements, (2) the Americans with Disabilities Act requirements, (3) requirements under Title VII of the Civil Rights Act of 1964, as amended, (4) the Age Discrimination in Employment Act requirements, (5) applicable building codes and zoning requirements of the City, (6) storm water, street, utility and other related infrastructure requirements, and (7) requirements related to the use, removal, storage, transportation, disposal and remediation of Hazardous Materials.
- .3 "Architect" – means the licensed design professional (whether such professional is a licensed architect or engineer) identified above as the "Architect", any replacement retained by the Owner (in the event of the termination of the design professional identified above), and such other person or entity designated in writing by the Owner to assume the responsibilities of the Architect under the Contract Documents in accordance with Section 4.1.3 of the General Conditions. Owner shall also reserve the

right to retain one or more separate engineering consultants with regard to the design of the Project ("Owner's Engineering Consultants").

- .4 "Contract Documents" -- those documents as described in Section 1.1, including the Exhibits listed in Section 11.5 of this Agreement.
- .5 "Contract" -- the contractual agreement between the Owner and the Construction Manager for the construction of improvements and such other required services for the Project, created by this Agreement, including the Exhibits attached hereto and incorporated herein, the General Conditions, and the other Contract Documents.
- .6 "Construction Manager's Reimbursable Conditions Costs" -- those administrative and supervisory personnel costs, direct project overhead, and other onsite costs and expenses incurred by Construction Manager in the performance of its administrative, supervisory, and management responsibilities under the Contract and reimbursable as Cost of the Work pursuant to Article 6. Such costs shall include, to the extent reimbursable as Cost of the Work pursuant to Article 6, the costs to furnish insurance, bonding, and utilities and to perform incidental work, including minor field labor performed by Construction Manager's employees, and the purchase of materials in connection therewith.
- .7 "Governmental Authority" or "Governmental Authorities" -- any federal, state and/or local agency, department, commission, board, bureau, administrative or regulatory body or other instrumentality having jurisdiction over the Project, including any public sector board, agency, or body which has been authorized by a Governmental Authority to exercise some portion of its jurisdiction over the Project.
- .8 "Project Site" -- that portion of the real property on which the Work is to be performed by Construction Manager or under which Construction Manager has control and Construction Manager's operations under the Contract are being performed, as more particularly described or identified in **Exhibit A** attached hereto.
- .9 "Self Perform Work" -- Work, other than supervision of the Work and minor Work in connection with Construction Manager's administrative and supervisory activities during the Construction Phase, that Construction Manager intends to perform by the Construction Manager's own forces, if authorized by Owner and the requirements hereof.
- .10 "Separate Contractor" -- when referring to a Separate Contractor of the Owner, shall be a contractor or supplier with whom Owner has contracted directly, other than the Construction Manager, to furnish materials or perform work at the Project Site.
- .11 "Indemnified Parties" -- those persons or entities identified or described in Section 3.18.1 of the General Conditions as "Indemnified Parties".

ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may agree for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

§ 2.1 Preconstruction Phase

The Preconstruction Phase shall commence upon the date specified in a Notice to Proceed for Pre-Construction Phase Services issued by the Owner and shall continue through completion of the Construction Documents and procurement of all major Subcontractor agreements. Construction Manager is not entitled to reimbursement for any costs incurred for Pre Construction Phase Services performed before issuance of the first Notice to Proceed. Pre-Construction Phase Services may overlap with Construction Phase Services.

§ 2.1.1 The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

§ 2.1.2 Consultation

The Construction Manager shall schedule and conduct meetings with the Architect, Blue Star, Owner's Engineering Consultants (as applicable), and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall consult with the Owner, Blue Star, Owner's Engineering Consultants (as applicable), and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the Owner, Blue Star, and Architect on constructability; availability of materials and labor; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically (as reasonably requested by Owner, but no less than monthly) update a **Project Schedule** for review by Architect and Blue Star and the Owner's approval. The Construction Manager shall obtain the Architect's approval for the portion of the Project Schedule relating to the performance of the Architect's services, including the issuance of design packages. The Project Schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project Schedule shall include proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a GMP Proposal (as defined below) for the Work, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed Critical Milestones (if any) and required date(s) of Substantial Completion. If preliminary Project Schedule updates indicate that previously approved Schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

§ 2.1.4 Phased Construction

§ 2.1.4.1 The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§ 2.1.4.2 The Work may be divided into one or more phases or packages which will be ready for commencement of construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Work. If the Owner elects to proceed before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any such phases or packages of the Work identified by the Owner. No Work, however, will be authorized to commence hereunder until the parties have entered into a written "Work Authorization Amendment" to this Agreement (see Section 2.2.10 below) which describes the Work to be performed thereunder, establishes a Guaranteed Maximum Price (a "Not to Exceed Price") for such Work, and establishes such Interim or Substantial Completion Dates for such Work as the parties may agree. Execution by Owner and delivery to Construction Manager of such a Work Authorization Amendment shall constitute Notice to Proceed for the Work specified therein but shall not constitute the commencement of the Work for purposes of computing the Contract Time requirements under Section 2.3.3 below, except as otherwise expressly provided in the respective Work Authorization Amendment. Construction Manager shall be allowed **% of the Cost of the Work for its Fee** for any such Work Authorization Amendment until such time as a Guaranteed Maximum Price for the entire Work is agreed upon by the parties in which case Section 5.1.1 shall control with respect to the total fee to be paid. When a Guaranteed Maximum Price for the entire Work is agreed upon by the parties, the fee shall be adjusted, if appropriate, as provided in Section 5.1.1 below and an appropriate credit shall be given by Construction Manager to any fees paid pursuant to any Work Authorization Amendments.

§ 2.1.5 Preliminary Cost Estimates

Completion deadlines with regard to the Project cannot reasonably be extended. When the design drawings are complete and all of the design packages have been bid by trade contractors, it will be too late in the process to substantially redesign the Project to meet the project budget. For that reason, it is the desire of the Owner to recognize any likely budget overruns as soon as possible, and by this Contract it is employing the Construction Manager to do the design monitoring, estimating, value engineering ("value analysis") and other functions to help the Owner meet the project budget. At any time that Construction Manager develops reasonable concerns based on their skill and

experience about the integrity of the project budget or viability of the schedule, Construction Manager is to promptly advise the Owner, Blue Star, and Architect of the concerns, and make recommendations in the best interests of the Owner's Project goals.

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect and Owner's Engineering Consultants, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for Blue Star's review and Owner's approval. If the Architect, Owner's Engineering Consultants, Blue Star, the Owner, or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 Throughout the Preconstruction Phase, the Construction Manager will review and monitor the various phases of the development of the design documents to determine whether or not the project budget remains realistic at each phase of the development of the design documents by the Architect and Owner's Engineering Consultants. As the Architect and Owner's Engineering Consultants progress with the preparation of the Schematic Design, Design Development and Construction Documents (for any phase of the Project if the Work has been broken down into Phases in accordance with the Contract Documents), the Construction Manager shall prepare and update, at the conclusion of the Schematic Design and Design Development phases and at such other appropriate intervals required by the Contract Documents or as otherwise agreed to by the Owner, Construction Manager and Blue Star, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for review by the Architect, Blue Star, and Owner's Engineering Consultants (as applicable) and for the Owner's approval. The Construction Manager shall inform the Owner and Blue Star when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

§ 2.1.6 Subcontractors and Suppliers

The Construction Manager shall develop bidders' interest in the Project.

§ 2.1.7 The Construction Manager shall prepare, for review by the Architect, Blue Star, and Owner's Engineering Consultants and for the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction (the "**Procurement Schedule**") which shall include a description of the items to be ordered and the required order dates in order to avoid delay to the schedule of the Work. Owner may supplement the Procurement Schedule by written notice to the Construction Manager and the Construction Manager shall amend the Procurement Schedule to reflect such items and set out the required order dates. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. Procurement prior to the parties' execution of the GMP Amendment shall be accomplished by Work Authorization Amendment entered into pursuant to Section 2.1.4.2 above and Section 2.2.10 below. If the Owner elects to procure directly any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions reasonably acceptable to the Construction Manager, and the cost of such items shall be included in the GMP Proposal. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all such contracts for these items to the Construction Manager and the cost of such items shall be included in the GMP Proposal, and the Construction Manager shall thereafter accept responsibility for them.

§ 2.1.8 Extent of Responsibility

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with Applicable Laws as defined herein, but the Construction Manager shall promptly report in writing to the Architect, Owner's Engineering Consultants (to the extent of a nonconformity in their design documents), Blue Star, and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect or the Owner's Engineering Consultants (with regard to their respective design documents) may require.

§ 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with all Applicable Laws as defined herein, including but not limited to statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance

under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi-governmental authorities for inclusion in the Contract Documents. Construction Manager's obligation for compliance shall also apply to changes in or additions to Applicable Laws effective as of the time of the Construction Manager's respective performance, subject to Construction Manager's right to make a claim for a change in the Contract Time pursuant to Section 8.3 of the General Conditions or an increase in the Contract Sum to the extent Construction Manager can establish that it incurred additional Cost of the Work arising from the change in or addition to Applicable Laws.

§ 2.1.9.1 M/WBE Requirements. Without limiting the foregoing, Construction Manager shall comply with all M/WBE and/or Small Business or other Disadvantaged Business requirements as provided in the Owner's solicitation documents in connection with the selection of the Construction Manager for the Project or as otherwise adopted by the Owner for the Project prior to the execution of the GMP Amendment and shall meet such M/WBE and/or Small Business or other Disadvantaged Business participation goals as established by the Owner for the Project or exercise good faith efforts to do so.

§ 2.1.9.2 Prevailing Wages. Attention is called to the Government Code, Chapter 2258, Prevailing Wage Rates. Among other things, this Article provides that it shall be mandatory upon the Construction Manager and upon any Subcontractor under him to pay not less than the prevailing rates of per diem wages in the locality at the time of construction to all laborers, workmen, and mechanics employed by them in the execution of the Contract. A Construction Manager or Subcontractor who violates the provisions of Chapter 2258, Government Code, shall pay to Owner, in addition to such other sums for which the Construction Manager is liable under the statute, the sum of Sixty Dollars and No/100 (\$60.00) for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rate stipulated in the scale of prevailing wages applicable to this Project, as required by Texas Government Code Section 2258.023(b).

Except as may otherwise be set out in the Agreement, the applicable prevailing rate of per diem wages for each respective craft or type of worker performing work by or through the Construction Manager (including workers of Subcontractors of all tiers) pursuant to the Contract and the prevailing rate for legal holiday and overtime work shall be the respective prevailing wage rates for [REDACTED] as determined by the United States Department of Labor in accordance with the Davis-Bacon Act (40 U.S.C. Section 276a *et seq.*, as currently amended).

2.1.10 VALUE ANALYSIS [VALUE ENGINEERING]

Construction Manager will provide on-going value analysis studies on construction systems and major construction components, including but not limited to the mechanical system, exterior envelope, structural system, roofing system, lighting and power service. The value analysis will be summarized in report forms and distributed to the Owner, Blue Star, the Architect, and the Owner's Engineering Consultants (with regard to their respective design documents).

§ 2.1.11 SENIOR PROJECT PERSONNEL

Construction Manager has identified to the Owner its Senior Project Personnel, including the Construction Manager's Project Manager who will be responsible for the Project, and all full-time supervisory personnel for the Project, including the superintendent, and their respective reimbursement rates (for salaries and benefits) as set out in **Exhibit C (Construction Manager's Personnel Rates Schedule)**. Construction Manager shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by the Owner, Construction Manager shall not remove or replace the persons or entities assigned to the Project except with the Owner's written consent, which consent shall not be unreasonably withheld. Construction Manager shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Construction Manager shall promptly update Owner in writing with the list of persons and consultants if they change during the course of the Project.

§ 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL

§ 2.2.1 No later than thirty (30) days after receipt of written request from Owner or as otherwise agreed by the parties, the Construction Manager shall prepare a Guaranteed Maximum Price proposal (the "GMP Proposal") in a form approved by the Owner for the Owner's review and acceptance. The Guaranteed Maximum Price in the GMP proposal shall be computed as the sum of the following:

- a. the Construction Manager's Estimated Cost of the Work (as approved by the Owner) which consists of the sum of the guaranteed or fixed prices of the Work, including those items procured by the Construction Manager pursuant to Section 2.1.7 above, and the reasonable, good faith estimate of the cost of the balance of the Work;

- b. a deductive amount for any savings incurred for bought-out, completed or partially completed Work included in duly executed Work Authorization Amendments approved prior to establishing the Guaranteed Maximum Price;
- c. the Construction Manager's Contingency pursuant to (and as limited by) Section 2.2.4 below;
- d. the Construction Manager's Fee in accordance with Section 5.1.1 below; and
- e. Allowances as approved by the Owner.

The Owner and Blue Star shall be entitled to full access to all details of the process of developing the GMP Proposal.

It is the intent of this Agreement that allowances, assumptions, clarifications, and any other loose elements that could lead to change orders after the Guaranteed Maximum Price is determined be held to a minimum. It is also the intent of this Agreement that all applicable elements of the Project be the subject to the trade contractor and subcontractor selection requirements of Chapter 2267 of the Texas Government Code (located at Chapter 2269 after September 1, 2013).

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect or the Owner's Engineering Consultants (with regard to their respective design documents), the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the GMP Proposal a written statement of its basis, which shall include the following:

- a. A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- b. A detailed list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP Proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- c. A list of allowances and a statement of their basis;
- d. A statement of the proposed Guaranteed Maximum Price, broken down into a Schedule of Values (in compliance with the requirements of Section 7.1.5 below), including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- e. The anticipated dates of Substantial Completion and Final Completion upon which the proposed Guaranteed Maximum Price is based (or the date required for each if such required date has been incorporated into the Contract prior to the submission of the GMP Proposal) and those Critical Milestones identified by the Owner; and
- f. A date by which the Owner must accept the Guaranteed Maximum Price (such date being no less than sixty days after submission of the GMP Proposal to Owner).

In the GMP Proposal, the Construction Manager shall also identify which Drawings and Specifications the Construction Manager contends will require revision in order to reflect the Construction Manager's proposed assumptions and clarifications and describe in detail the revisions to Drawings and Specifications which Construction Manager contends will be necessary if such assumptions and clarifications are agreed upon per Subparagraph 2.2.8.

Except as otherwise agreed in writing by the parties, Construction Manager shall prepare and submit its GMP Proposal to the Owner within thirty (30) days following the issuance of Construction Documents for the Work sufficiently complete to allow the Construction Manager to "Buy-Out" the Work (subject to allowances, assumptions, and qualifications reasonably proposed by Construction Manager and agreed by Owner).

§ 2.2.4 It is understood and agreed that the Guaranteed Maximum Price for the Work shall include a Construction Manager's Contingency in a reasonably appropriate amount not to exceed two percent (2%) of the Estimated Cost of the Work component of the Guaranteed Maximum Price (without such Contingency) as established in the GMP Amendment (it shall not be adjusted for subsequent changes in the GMP) for the sole purpose of protecting the Construction Manager from Cost of the Work over-runs in line items in its Schedule of Values and other Cost of the

Work that were not included in the Guaranteed Maximum Price. Such costs reimbursable from Construction Manager's Contingency must be costs that would be reimbursable as Cost of the Work Section 6.1 through 6.7 below. Costs that are not reimbursable under Section 6.8 below shall not be reimbursable from Construction Manager's Contingency.

It is expressly understood and agreed that, to the extent that a Change Order is warranted under the terms of this Agreement, the Construction Manager's Contingency fund is not to be utilized for unforeseen conditions for which the Owner is responsible hereunder, events of force majeure (see Section 8.3 of the General Conditions), or design changes which constitute a change in the scope of the Work and for which the Owner is responsible hereunder. Sums may be charged to the Construction Manager's Contingency only to the extent that the same have been paid or are to be paid by Construction Manager. Notwithstanding anything in the Contract Documents to the contrary, no charge shall be made against the Construction Manager's Contingency without Owner's written consent, such consent not to be unreasonably withheld.

§ 2.2.5 The Construction Manager shall meet with the Owner and Blue Star to review the GMP Proposal. In the event that the Owner and/or Blue Star discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP Proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the GMP Proposal in writing within the time required for the acceptance of the GMP Proposal, the GMP Proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment ("GMP Amendment") amending this Contract. The GMP Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

§ 2.2.8 The Owner shall authorize the Architect (or the Owner's Engineering Consultants with regard to their respective design documents) to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the GMP Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect (or the Owner's Engineering Consultants with regard to their respective design documents) of any inconsistencies between the GMP Amendment and the revised Drawings and Specifications, and such notice shall describe in detail each inconsistency.

§ 2.2.9 To the extent any sales, rental or use of labor, equipment or materials for the Project are subject to sales or use tax under Applicable Law, the Construction Manager shall include in the Guaranteed Maximum Price all such sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the GMP Amendment is executed.

§ 2.2.10 As noted in Section 2.1.4, some phases of the Work may be ready for construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Project. If the Owner elects to proceed with any packages of the Work before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any phases of the Work identified by the Owner.

§ 2.2.10.1 Until a Guaranteed Maximum Price for the entire Project has been established and accepted by the Owner, the Construction Manager and Owner agree to use the Work Authorization Amendment in a mutually acceptable format to authorize work to begin based on a specified scope and a specified "not to exceed" price. The price and the scope of Work identified with each previously approved Work Authorization Amendment will be included in the Guaranteed Maximum Price at the time the Contract Documents are sufficiently complete to establish the Guaranteed Maximum Price ("GMP"), subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above. Prior to the Owner's acceptance of the Guaranteed Maximum Price for the entire Work, Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work for Construction Phase services, except as the Owner may specifically authorize in an executed Work Authorization Amendment as required herein.

§ 2.2.10.2 Except as otherwise agreed by Owner and Construction Manager, when a GMP Proposal for any portion of the Work is agreed upon by the parties pursuant to a Work Authorization Amendment, the Guaranteed Maximum Price amounts for those portions which have been previously approved by the Owner shall be combined and shall be used in pricing those portions of the Work covered by such Guaranteed Maximum Price proposals, subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above, and all separate Guaranteed Maximum Price proposals previously agreed to by the parties shall be of no further force and effect.

§ 2.2.11 GMP ADJUSTMENT FROM SUBCONTRACT BUY-OUT. *Except as otherwise expressly authorized in writing by Owner, Construction Manager shall enter into written Subcontracts (which for purposes hereof includes a subcontract agreement covering any Self-Perform Work expressly authorized by Owner, supply agreements and purchase orders) for the respective scope of the Work with fixed pricing terms and in accordance with the requirements of the Contract Documents no later than sixty (60) days after the GMP Proposal has been accepted.* Construction Manager shall provide Owner with copies of the respective executed Subcontracts with the pricing terms no later than three (3) business days after such Subcontracts have been entered into. In no event shall Construction Manager commence Self Perform Work, order materials, or permit a Subcontractor to commence its portion of the Work prior to furnishing Owner with a copy of such executed Subcontract.

The parties acknowledge that, when most of the Subcontracts covering the entire Work are entered into, but in no event less than 90 days after the GMP Proposal has been accepted, and at Owner's request, the Estimated Cost of the Work in the individual line items on which the Guaranteed Maximum Price is based shall be subject to adjustment as provided herein to reflect the fixed Cost of the Work pursuant to the Subcontracts (referred to herein as "Buy-Out"). As Buy-Out occurs, Construction Manager shall provide a proposed adjustment to the respective line items in the Schedule of Values to reflect the Cost of the Work fixed by the respective Subcontracts. To the extent that the fixed Cost of the Work is less than the Estimated Cost of the Work for a respective line item, such line item shall be reduced accordingly and the Construction Manager's Contingency shall be increased accordingly. To the extent that the fixed Cost of the Work is greater than the Estimated Cost of the Work for a respective line item, the Guaranteed Maximum Price shall not be increased, but such line item shall be increased by such amount to the extent such amounts are available from Construction Manager's Contingency or from an established "savings" from another line item (with that line item being reduced accordingly).

However, such transfer to Construction Manager's Contingency from line item "savings" achieved from Subcontract Buy-Out shall not exceed, in the aggregate of all savings transferred, 50% of the amount established in the Construction Manager's Contingency under Section 2.2.4 above. To the extent the aggregate amount of line item "savings" achieved from Subcontract Buy-Out exceeds such sum, the Guaranteed Maximum Price shall be reduced in the amount of such excess line item "savings".

The adjustments as provided herein shall be incorporated by Change Order, with any net savings reducing the Guaranteed Maximum Price accordingly.

§ 2.2.11.1 The Construction Manager shall document the actual Cost of the Work at Buy-Out as compared to the GMP Proposal and shall report this information to the Owner monthly and with Construction Manager's recommendation for selection of a bid/proposal for each subcontracting package.

§ 2.2.12 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by the Construction Manager in the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Construction Manager's estimated Reimbursable Conditions Costs and estimated Costs of the Work organized by trade; the amount of the Construction Manager's Contingency; and the Construction Manager's Fee for the Construction Phase.

§ 2.2.13 The GMP Proposal shall allow for reasonably expected changes and refinements in the Drawings and Specifications through completion of the Construction Documents, except for material changes in scope. The GMP Proposal shall also expressly include all Reimbursable Conditions Costs and such other costs and expenses directly incurred by the Construction Manager in connection with its administration and supervision of the Work through Final Completion of the Work, regardless of whether Construction Manager achieves Final Completion within any deadlines set forth in Section 2.3.3.2 below.

§ 2.2.14 The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work covered thereby and for establishment of the Guaranteed Maximum Price. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality of material and/or workmanship shall prevail over all other interpretations.

§ 2.2.15 The GMP Proposal shall adopt and incorporate all of the terms and conditions of the Contract. Any proposed deviation from the terms and conditions of the Contract must be clearly and conspicuously identified to the Owner in writing and specifically accepted by the Owner. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by the Owner and the terms of this Agreement and Modifications thereto (other than the GMP Amendment), the terms of the Agreement and such Modifications shall control.

§ 2.2.16 Owner may accept or reject a Guaranteed Maximum Price Proposal or attempt to negotiate its terms with Construction Manager. Upon acceptance by the Owner of a GMP Proposal in writing, both parties shall execute the GMP Amendment incorporating the agreed upon terms of the GMP Proposal. If the Owner rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, the Owner may terminate this Agreement as provided in Article 10 below.

§ 2.2.17 In submitting the GMP Proposal, the Construction Manager represents that it will provide every item, system or element of Work that is identified, shown or specified in the GMP Proposal or the supporting documents, along with all necessary or ancillary materials and equipment for their complete operating installation, unless specifically excepted by the Owner. Upon Owner's acceptance of the GMP Proposal, the Construction Manager shall not be entitled to any increase in the Guaranteed Maximum Price due to the continued refinement of the Construction Documents or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project or applicable Work Package as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP, except as expressly qualified in the GMP Amendment.

§ 2.2.18 Following the Owner's acceptance of the GMP Proposal and the parties' execution and of the GMP Amendment, Construction Manager shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, the Construction Manager shall deliver a monthly status report to the Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents.

§ 2.3 Construction Phase

§ 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of the General Conditions, the date of commencement of the Work shall mean the date of commencement of the Work, or any respective portion thereof, as stated in a written Notice to Proceed issued by the Owner or as stated in the GMP Amendment.

§ 2.3.1.2 The Construction Phase (as such term is used in this Agreement) shall commence on the date as stated in a written Notice to Proceed issued by the Owner for the commencement of Work (or any portion thereof) or as expressly stated in the GMP Amendment.

§ 2.3.2 Administration

§ 2.3.2.1 Except as may be otherwise directed or approved by Owner, all Subcontracts (including purchase orders) shall be awarded pursuant to competitive bids and according to the following procedure. The procedure for obtaining such bids shall be approved by the Owner and shall comply with and be governed by the requirements of Subchapter F of Chapter 2267 of the Texas Government Code (located at Chapter 2269 of the Texas Government Code after September 1, 2013). All bids shall be opened in the presence of the Owner or its duly designated representative. The Owner shall then determine, with the advice of the Construction Manager and Blue Star, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.1.1 If the Construction Manager intends to perform Work by its own forces (Self-Perform Work), other than supervision of the Work, or through a Related Party (as defined in Section 6.10 below), Construction Manager shall notify Owner, in writing, of such intent and how the bid pricing will be obtained (whether on the basis of a stipulated sum, unit price, or cost of the work plus a stipulated mark-up subject to a guaranteed maximum price). Construction Manager must obtain Owner's written approval prior to solicitation of bids. If Owner approves Construction Manager's request to submit pricing for Self-Perform Work or from a Related Party, Construction Manager must competitively bid as required herein for all Subcontracts; provided, however, all bids, including Construction Manager's bid (which must fully comply with all applicable requirements for bids from Subcontractors) and the Related Party's bid, shall be submitted directly to Owner (or its designated representative) and shall be opened by Owner (or its designated representative).

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and when the Owner requires a higher bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price as provided in Section 2267.256(b) of the Texas Government Code (located at Chapter 2269 of the Texas Government Code after September 1, 2013).

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Contract. Without limiting the foregoing, Construction Manager's subcontract and purchase order forms shall be subject to approval of Owner and shall provide that subcontractor shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents. Subcontracts shall not be awarded on the basis of cost plus a fee.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "Related Party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 2.3.2.1.

§ 2.3.2.5 The Construction Manager shall schedule and conduct regular, weekly meetings at which the Owner, Blue Star, Architect, Construction Manager and appropriate Subcontractors can discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner, Blue Star, and Architect.

§ 2.3.2.6 At or before the execution of the GMP Amendment, the Construction Manager shall prepare and submit to the Owner, Blue Star, and Architect a construction schedule for the Work ("**Construction Manager's Progress Schedule**") and submittal schedule in accordance with Section 3.10 of the General Conditions. Reference in the General Conditions to the "Contractor's Progress Schedule" shall mean the Construction Manager's Progress Schedule.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project in accordance with Section 3.10 of the General Conditions. On a monthly basis, or otherwise as required by Section 3.10 of the General Conditions or as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner, Blue Star, and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner, Blue Star, and Architect in the weekly meetings held pursuant to Section 2.3.2.5 above, a daily log containing a record for each day of weather for the previous week, portions of the Work in progress, identification of the Subcontractors working on the site and the number of workers on site, identification of equipment on site, problems that might affect progress of the work (including weather impact from the previous week), accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner, Blue Star, and Architect and shall provide this information in its monthly reports in accordance with Section 2.3.2.7 above.

§ 2.3.2.9 The Construction Manager shall coordinate the work of the various Subcontractors and develop and maintain protocols and onsite procedures with Subcontractors that will facilitate early discovery and mitigate the impact of coordination problems and potential Subcontractor defaults that could adversely impact the cost and progress of the

§ 2.3.3 CONTRACT TIME

§ 2.3.3.1 The Contract Time with regard to the Construction Phase Services shall be measured from the Date of Commencement as provided pursuant to Section 2.3.1.1. It is currently intended by the parties that the Date of Commencement of the Construction Phase shall be on or about _____, 20__ (subject to earlier commencement of a portion of that Work by Work Authorization Amendment).

§ 2.3.3.2 Time is of the essence of this Contract. The Construction Manager shall diligently prosecute the Work and achieve Substantial Completion of the Work not later than _____ calendar days from the date of the commencement of the Work or as otherwise as set forth in the applicable Work Authorization Amendment or the GMP Amendment, subject to adjustments as provided in the Contract Documents. After Substantial Completion, the Construction Manager shall diligently continue to prosecute the Work to Final Completion and, except as otherwise expressly agreed in the GMP Amendment, shall achieve Final Completion not later than sixty (60) calendar days from the later of the Date of Substantial Completion or receipt of Owner's final "punch list."

§ 2.3.3.3 Owner retains the right to identify specific areas for early Substantial Completion sufficient to allow for installation of Owner's fixtures, furniture, and equipment, phased use or partial occupancy of the facility, or providing access to Owner's Separate Contractors or vendors for finish-out work. The parties acknowledge that a Work Authorization Amendment, the GMP Amendment, or such other Modification of the Agreement may create such milestones requiring certain phases or scopes of work to be substantially performed or completed at certain specified times. Collectively, the times required for early Substantial Completion and the milestones described above are referred to in the Contract Documents as "**Critical Milestones**". The Critical Milestones made a part of the Contract are critical elements of the Contract Time requirements under the Contract and are "of the essence" of the Contract.

§ 2.3.3.4 The Owner reserves the right to modify or revise the Critical Milestones and the Project Schedule by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall strictly comply with the notice requirements set forth in Article 15 of the General Conditions. If Construction Manager fails to provide notice as required by Sections 15.1.2 and 15.1.4 of the General Conditions within ten (10) days after receipt of Owner's notice with regard to the modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall be deemed to have waived any right to seek or recover an increase in the Contract Sum or Contract Time as a result thereof. Such change in the Contract Time requirements shall be incorporated into the Contract Documents by Change Order or Construction Change Directive if the Construction Manager wrongfully fails or refuses to execute the Change Order.

§ 2.3.3.5 In the event Construction Manager shall fall behind schedule for any reason which does not justify an extension under Section 8.3 of the General Conditions of the Substantial Completion Date or any other Contract Time requirements, Construction Manager shall, within ten (10) days after written request of Owner, develop and deliver a recovery plan to the Owner with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps Construction Manager shall take to meet the requirements of the Contract with regard to the Contract Time. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Contract Sum for the scheduled recovery efforts, except as to causes of delay to the critical path not the fault of the Construction Manager under Section 8.3 of the General Conditions. No approval or consent by the Owner or any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses which Owner may suffer by reason of such re-sequencing or the failure of the Construction Manager to meet the Substantial Completion Date or other requirements of the Contract with regard to the Contract Time.

§ 2.3.3.5.1 Owner shall additionally be entitled to direct the acceleration or re-sequencing of the Work in order to achieve completion prior to the required date for Substantial Completion or to meet any other Contract Time requirements of the Contract, and Construction Manager shall be reimbursed for the amount of the premium portion of overtime actually incurred in respect thereto and shall be entitled to an increase adjustment to the Contract Sum to the extent of the premium portion of overtime so incurred. Before proceeding with any such Owner-directed acceleration

plan under this subsection, the Construction Manager shall have received the Owner's prior written approval of the plan and its anticipated not-to-exceed cost.

§ 2.3.3.6 Except as provided in the Project Schedule approved by the Owner or in Section 8.3 and Article 15 of the General Conditions, adverse weather conditions are not anticipated to impact the progress of Construction Manager's work (allowance has been made in the Project Schedule and in the Construction Manager's Progress Schedule for weather conditions, other than delay due to adverse weather conditions abnormal for the period of time). However, Construction Manager will record on a daily basis whether and how its job progress has been materially affected by such conditions. Any such day lost due to adverse weather conditions (except such delay for which Construction Manager is entitled to an extension of the Contract Time under Section 8.3 and Article 15 of the General Conditions) shall be made up by Construction Manager performing work on the ensuing Saturday or by extended hours during that week or with best efforts the ensuing Sunday, and treating such as a work day for the purpose of complying with and meeting the Construction Manager's Progress Schedule (prior to such delay) and the Contract Time requirements, including the Critical Milestones and the Project Schedule. Notwithstanding the foregoing, it is expressly understood that no application for extension of time will be made unless the critical path of the project is materially affected. The Construction Manager will provide written explanation and CPM schedule evidencing such impact has occurred. Construction Manager will notify Owner of any such delay in writing, and on a monthly basis submit a report to the Owner substantiating any days claimed to have been lost, over and above those allotted for in the Construction Manager's Progress Schedule, due to adverse weather conditions.

For purposes hereof, weather conditions are "abnormal for the period of time" to the extent that the cumulative number of days of delay to the critical path as a result of adverse weather conditions exceeds ____ calendar days in any ____ day period. Provided, however, no day on which substantial Construction Manager forces are able to perform critical path work on the Project for more than fifty percent (50%) of the usual workday will be counted as day of delay.

§ 2.3.3.7 LIQUIDATED DAMAGES. The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of the entire Work and to meet the completion requirements of the Critical Milestones, if any, within the Contract Time as established by the appropriate Work Authorization Amendment, the GMP Amendment, or other Modification of the Agreement, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail, or refuse to achieve Substantial Completion of the entire Work by the date required by the Contract Documents for Substantial Completion of the entire Work or to meet the completion requirements of the Critical Milestones, if any, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager (and the Construction Manager's Surety, if any, in the case of default) agrees to pay to the Owner as Liquidated Damages, and not as a penalty or forfeiture, the sum or sums for each day of such delay as set forth below:

the sum of _____ and no/100 (\$_____) Dollars per day for each day of delay in achieving Substantial Completion of the entire Work.

Such Liquidated Damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work or relevant portion thereof, but shall not be in lieu of any actual, direct costs incurred by Owner in supplementing, accelerating, completing, or correcting the Work resulting from Construction Manager's breach of its obligations arising under the Contract, including all design and consulting costs also arising therefrom. The Owner may deduct Liquidated Damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any Liquidated Damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Construction Manager.

In no event will the total amount of Liquidated Damages exceed the sum of \$_____.

§ 2.3.3.7.1 To the extent that the parties enter into a Work Authorization Amendment for a portion of the Work, the parties may agree therein to a required Substantial Completion Date for such portion of the Work and separate Liquidated Damages for the Construction Manager's failure to achieve Substantial Completion of such portion of the Work within the Contract Time requirements provided therein.

§ 2.3.4 THE WORK OF THE CONTRACT

§ 2.3.4.1 The Construction Manager shall fully execute the Work described in the Contract Documents or reasonably inferable by the Construction Manager as necessary to produce the results indicated by the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

§ 2.3.4.2 The Construction Manager shall perform the Work at the location or locations described in the **Project Site Description** attached hereto as **Exhibit A** (the "Project Site"). The Construction Manager shall confine its operations and restrict its staging and storage of machinery, equipment, and materials to those areas within the Project Site or to such other areas authorized in writing by the Owner or permitted by the authorities having jurisdiction for those improvements required in the public way (the "Project Boundaries/Staging Areas Plan"). On or before submitting its GMP Proposal to Owner, Construction Manager shall furnish Owner with its proposed Project Boundaries/Staging Areas Plan for Owner's approval. Except with Owner's written approval, no Work shall commence on the Project Site prior to the Owner's approval, in writing, of the Construction Manager's Project Boundaries/Staging Areas Plan. Construction Manager shall not encumber the Project Site and adjacent areas with any materials or equipment and shall arrange and maintain its materials and equipment in an orderly manner so that Owner's Separate Contractors shall have free and unimpaired access to and within the Project Site and any construction occurring there and in adjacent areas.

§ 2.3.4.2.1 The Owner reserves the right to make reasonable modifications or revisions to the Construction Manager's Project Boundaries/Staging Areas Plan by written notice to Construction Manager or by a Modification of the Agreement and **Exhibit A** attached hereto. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Construction Manager's Project Boundaries/Staging Areas Plan, the Construction Manager shall strictly comply with the notice requirements set forth in Section 15.1.2 of the General Conditions.

§ 2.3.4.3 The Construction Manager shall furnish only skilled and properly trained staff for performance of the Work. The key members of the Construction Manager's staff shall be Construction Manager's Senior Project Personnel identified under Section 2.1.11 above and in the **List of Designated Representatives and Contact Persons [including Construction Manager's Senior Project Personnel]** attached hereto as **Exhibit B**, and such other persons agreed upon with the Owner, any such agreement not to be unreasonably withheld. Such key members of the Construction Manager's staff shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer, or termination of employment with the Construction Manager. Without limiting the foregoing, during the performance of the Work, the Construction Manager shall keep a competent superintendent at the Project site at all times, fully authorized to act on behalf of the Construction Manager. Notice from the Owner to one of Construction Manager's designated representatives identified in **Exhibit B** in connection with defective Work or instructions for performance of the Work shall be considered notice of such issues to the Construction Manager.

§ 2.4 Professional Services

Section 3.12.10 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

§ 2.5 Hazardous Materials

Section 10.3 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

§ 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and site requirements. Construction Manager shall immediately give written notice to Owner upon each determination by Construction Manager that any of the 'full information' referenced in the immediately preceding sentence is not being timely provided by Owner, with such notice detailing what information is not being timely provided.

§ 3.1.2 Prior to the execution of the GMP Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations

under the Contract, to the extent required for compliance with Section 56.054 (e) of the Texas Business & Commerce Code. Thereafter, the Construction Manager may only request such evidence if a change in the Work materially changes the Contract Sum or to the extent Owner is otherwise required to provide such information by Applicable Law. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.3 The Owner has established an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies, as determined in Owner's sole discretion, for changes in the Work and other costs which are the responsibility of the Owner.

§ 3.1.4 **Structural and Environmental Tests, Surveys and Reports.** During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by Applicable Law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 3.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Owner, when such services are requested, shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Owner shall be obligated to furnish only those items described in Paragraph 3.1.4 and its subparagraphs as are reasonably necessary.

§ 3.2 Owner's Designated Representative

The Owner's designated representative(s) for the Project is (are) set forth in the **List of Designated Representatives and Contact Persons** attached hereto as **Exhibit B** and incorporated fully herein. Such designated representative(s) shall have such authority to act on behalf of the Owner with respect to the Project as specifically set forth in **Exhibit B**. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of the General Conditions, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.2.1 **Legal Requirements.** The Owner shall furnish such legal, insurance and accounting services, including auditing services, that it may determine to be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

§ 3.3 Architect

The Owner has retained an Architect to provide those professional services described in the Agreement between the Owner and the Architect, Construction Manager will be furnished a copy of the Architect's Agreement upon request.

Owner reserves the right to change the Architect at any time or to modify the terms of its contractual agreement with the Architect. Owner shall give Construction Manager reasonably timely notice of any termination or replacement of the Architect and of any material changes in its contractual agreement with the Architect that bears on the Work hereunder or the responsibilities or liabilities of the Construction Manager arising under this Contract.

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

§ 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as provided in this Section 4.1.

§ 4.1.2 For the Construction Manager's Pre-Construction Phase services described in the Contract Documents, including Sections 2.1 and 2.2 above, and performed prior to the commencement of the Construction Phase of the Work, Construction Manager's total compensation (including reimbursement of costs and expenses) shall be as follows:

(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)

Construction Manager will be paid a Pre-Construction Phase Fee in the stipulated sum of _____ Dollars (\$ _____), payable as set forth in Section 4.2 below.

§ 4.1.3 Such Pre-Construction Phase Fee shall be Construction Manager's total compensation for the performance of Pre-Construction Phase services. Construction Manager shall not be entitled to reimbursement of costs and expenses incurred in the performance of such services in addition to the Pre-Construction Phase Fee.

(Paragraph deleted)

§ 4.2 Payments

§ 4.2.1 Payment for Construction Manager's Pre-Construction Phase services shall be paid as follows: _____.

Amounts not in good faith dispute and properly billed and due to Construction Manager which are unpaid thirty (30) days after the invoice date shall bear interest as provided in Subchapter B, Chapter 2251, Texas Government Code.

(Paragraphs deleted)

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds for the Construction Manager's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee, except as limited by the Guaranteed Maximum Price, shall be as follows:
(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

The Construction Manager's Fee for the entire Project (including any fee for Preconstruction Phase services) is _____ and no/100 Dollars (\$_____.00). This fee shall not be increased for any changes in the Work unless the final Guaranteed Maximum Price for the Project is in excess of _____ and no/100 Dollars (\$_____.00), in which case the Construction Manager's fee shall be increased by __% of the amount by which the Guaranteed Maximum Price exceeds \$_____.00.

The Construction Manager's Fee shall be the Construction Manager's complete fee compensation (which includes Construction Manager's profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Sections 6.1 through 6.7 of this Agreement, shall constitute Construction Manager's sole reimbursement for indirect and direct costs and expenses, general conditions, and profit arising from or attributable to the performance of the Work as described herein.

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

see Section 5.1.1 above.

§ 5.1.3 Limitations, if any, on a Subcontractor's reimbursable costs, as well as overhead and profit for changes in the cost of its portion of the Work are, except as otherwise expressly approved in writing by Owner, as provided in **Exhibit E – Change Order Pricing**, and as follows:

In calculating an adjustment to the Guaranteed Maximum Price for a change in the Work, any Subcontractor mark-up (for increases) for indirect and direct overhead costs, administrative costs, and profit shall not exceed ____% of the Cost of the Work to be performed by such Subcontractor and markdowns for decreases shall not be less than ____% of the Cost of the Work to be performed by such Subcontractor.

§ 5.1.4 [Intentionally deleted.]

§ 5.1.5 [Intentionally deleted.]

(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

§ 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the GMP Amendment, as it is amended from time to time to reflect additions and deductions by changes in the Work as provided in the Contract Documents. To the extent the Cost of the Work, together with the Construction Manager's Fee thereon, exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

§ 5.2.1.1 Notwithstanding any provision herein to the contrary, no Work is authorized to commence hereunder until a Guaranteed Maximum Price for that Work has been made the subject of the GMP Amendment or a Work Authorization Amendment to this Contract and a Notice to Proceed has been issued by the Owner with regard to such Work (which such Notice to Proceed may be included in the respective GMP Amendment or Work Authorization Amendment.

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 5.2.3 Savings. If the allowable, final, verified, audited amount of the Cost of the incurred by the Construction Manager, together with the Construction Manager's Fee, is less than the Guaranteed Maximum Price, as adjusted in accordance with the Contract Documents, the entire difference shall be credited to the Owner and the final Contract Sum shall be adjusted accordingly.

If the total of the Cost of the Work and the Construction Manager's Fee is greater than the Guaranteed Maximum Price as modified pursuant to the requirements of the Contract, then the Guaranteed Maximum Price shall be the total amount payable by the Owner to the Construction Manager, and all costs of completing the Work in excess of the Guaranteed Maximum Price shall be paid by the Construction Manager.

§ 5.3 Changes in the Work

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Construction Manager shall be entitled to an adjustment in the Contract Time as a result of changes in the Work only as provided in the Contract Documents and subject to the requirements thereof, including the timely notice requirements of Article 15 of the General Conditions.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the GMP Amendment may be determined by any of the methods listed in Section 7.3.3 of the General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "mark-up" as used in Section 7.3.3.3 of the General Conditions and the term "costs" as used in Section 7.3.7 of the General Conditions shall have the meanings assigned to them in the General Conditions and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of this Agreement, unless the Owner has furnished the Construction Manager with prior written approval of the form and substance of a subcontract, in which case such adjustments shall be calculated in accordance with the terms and conditions of that subcontract.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 Notwithstanding the foregoing in this Section 5.3, no change in Construction Manager's fee or overhead will be allowed for any additive or deductive change orders except as specifically provided for in this Agreement.

§ 5.3.6 Except as otherwise expressly provided herein or in the GMP Amendment, in calculating an adjustment to the Guaranteed Maximum Price for a change in the Work resulting in a change to the Construction Manager's Reimbursable Conditions Costs, such adjustment shall be based upon the actual estimated increase or reduction of such costs rather than a percentage or otherwise pre-determined mark-up or mark-down.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7 which are directly related to the Project.

§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing the GMP Amendment.

§ 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior written approval, at off-site workshops, and only to the extent such workers are actually performing Work directly related to the Project. Cost to be reimbursed will be the actual wages paid to the individuals performing the Work.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site, or when stationed off-site with the Owner's prior written approval, but only for that portion of their time required for and actually performing supervisory or administrative services directly related to the Project. Such rates shall not exceed those set forth on **Exhibit C (Personnel Rates Schedule)**, unless approved in writing by Owner.

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work. Such rates shall not exceed those set forth on **Exhibit C**, unless approved in writing by Owner.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such

costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. Such costs shall be reimbursed at the fixed rates or with such fixed "mark-up" ("labor burden") as set forth in **Exhibit C**.

(Paragraph deleted)

§ 6.2.4.1 If a fixed rate or labor burden has been not been set forth in **Exhibit C** for a specific employee or employee classification, all personnel costs for such employee(s) will be subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by the Construction Manager for services performed for the Project by such employee(s). In such event, employee bonuses and/or costs associated with Employee Stock Ownership Plans (ESOP) for such employee(s) will not be separately reimbursable as Cost of the Work (*i.e.*, must be covered by the Construction Manager's Fee).

§ 6.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts properly entered into under the Contract Documents.

§ 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 6.4.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ 6.4.2 Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

§ 6.5.2 Rental charges for Construction Manager-owned or leased vehicles assigned to those personnel defined in Section 6.2.1 and 6.2.2 above, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the fair market value of such item at the time such item was placed into use for the Project, subject to the terms and conditions of this Section 6.5.2 and at such rates as provided and limited herein.

§ 6.5.2.1 The projected usage for each piece of equipment to be rented for use on the Project and the estimated total rentals shall be considered by the Construction Manager and discussed with the Owner before the piece of equipment is rented so that an appropriate rent versus buy decision can be made. If the decision is made to purchase equipment for the Project, such purchased equipment shall be considered "job owned". At the completion of the Project, the Construction Manager shall transfer title and possession of all remaining job-owned equipment to the Owner, or Construction Manager may keep any such equipment for an appropriate fair market value credit to job cost, which will be mutually agreed to by Owner and Construction Manager.

§ 6.5.2.2 Each piece of equipment to be rented shall have hourly, daily, weekly and monthly rates) and the most economical rate available shall be reimbursed based on the circumstances of actual need and usage of the piece of equipment while it is stationed at the jobsite. When the piece of equipment is no longer needed for the work, no rental charges will be reimbursed if the piece of equipment remains at the jobsite for the convenience of the Construction Manager.

§ 6.5.2.3 The reimbursable equipment rental rates for equipment owned by Construction Manager or a Related Party shall be at rates subject to Owner's prior approval and shall not exceed 75% of the published rates based on the latest edition of "Rental Rates and Specifications" published by the Associated Equipment Distributors (AED). If the AED publication does not contain information related to the type of equipment rented, the maximum equipment

rental rate shall not exceed 75% of the current competitive rental rates from local third party equipment rental companies.

§ 6.5.2.3.1 The aggregate rentals chargeable for each piece of tools or equipment owned by Construction Manager or a Related Party shall not exceed 50% of the fair market value of such equipment at the time of its commitment to the Work. The original purchase price and date of purchase of the equipment will be documented with a copy of the purchase invoice for the piece of equipment. Such aggregate limitations will apply and no further rentals shall be charged even if a piece of equipment is taken off the job and is later replaced by a similar piece of equipment. For purposes of computing the aggregate rentals applicable to aggregate rental limitations, rental charges for similar pieces of equipment will be combined if the pieces of equipment were not used at the same time.

§ 6.5.2.3.2 Fair market value for used material and equipment as referred to in this Contract shall mean the estimated price a reasonable purchaser would pay to purchase the used material or equipment at the time it was initially needed for the Work of the Project.

§ 6.5.2.4 Rental charges for equipment not owned by Construction Manager or any of its affiliates, subsidiaries, or other Related Parties and rented from third parties for use in proper completion of the Work shall be considered reimbursable and will be reimbursed at actual costs, as long as rental rates are consistent with those prevailing in the locality. For any lease/purchase arrangement where any of the lease/purchase rental charges were charged to Owner as reimbursable Cost of the Work, appropriate credit adjustments to the Cost of the Work will be made for an appropriate pro rata share of the fair market value of the equipment at the time it was last used on the Project.

§ 6.5.2.5 All losses resulting from lost, damaged or stolen tools and equipment shall be the sole responsibility of the Construction Manager, and not the Owner, and the cost of such losses shall not be reimbursable under this Contract. However, this limitation is not intended to prevent the Construction Manager from recovering any such loss under the Builders Risk insurance furnished for the Project; to the extent such loss is recoverable.

§ 6.5.2.6 The Construction Manager shall be required to maintain a detailed equipment inventory of all job-owned equipment (either purchased and charged to Cost of the Work or job-owned through aggregate rentals) and such inventory shall be submitted to Owner each month. For each piece of equipment, such inventory should contain at a minimum (1) original purchase price or acquisition cost, (2) acquisition date, (3) approved FMV at the time the piece of equipment was first used on the job, and (4) final disposition.

§ 6.5.2.7 All costs incurred for minor maintenance and repairs are considered to be covered by the rental rates. Such costs include routine and preventative maintenance, minor repairs and other incidental costs. In addition, repairs and/or replacement of a capital nature are considered to be covered by the rental rates. Major repairs and overhauls are not considered routine and ordinary; consequently such costs are not reimbursable and are intended to be covered by the rental rates. All mileage associated with equipment is covered in the rental rate.

§ 6.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ 6.5.4 Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

§ 6.5.5 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

(Paragraph deleted)

§ 6.6 Miscellaneous Costs

§ 6.6.1 The actual cost of premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract, based upon such minimum limits for coverage as required by **Exhibit D (Insurance and Surety Requirements)** attached hereto, which rates shall be final for the duration of the Project (and only subject to adjustment for changes in the scope or duration of the Project).

The agreed premium rate for Construction Manager's coverage for General Liability, as required in Exhibit D is as follows:

% of the Cost of the Work.

§ 6.6.1.1 If Construction Manager elects to purchase subcontractor default insurance (such as SubGuard insurance) in lieu of subcontractor bonds to cover the default of its Subcontractors, such subcontractor default insurance cost shall be reimbursable as Cost of the Work at the rate of _____ percent (____%) of the value of the subcontracts, including the purchase orders, actually enrolled in and covered by such subcontractor default insurance. Any Construction Manager costs incurred in connection with the subcontractor default insurance program that exceeds the amount reimbursed by the Owner under the formula in this paragraph will not be reimbursable as Cost of the Work (i.e., must be covered by the Construction Manager's Fee). If Construction Manager obtains subcontractor default insurance but elects to bond a Subcontractor not covered by such insurance, the amount reimbursable as Cost of the Work for the premium cost of the bond shall not exceed the amount that would have been reimbursable had the Subcontractor been enrolled in the subcontractor default insurance as provided above.

§ 6.6.1.2 Construction Manager shall not be entitled to reimbursement of premium charges for self-insurance coverage furnished by Construction Manager, including self-insured retentions, except as otherwise expressly authorized in writing by the Owner. To the extent that Construction Manager is entitled to reimbursement for self-insurance coverage or "Contractor-Controlled" liability insurance coverage, premium costs shall be reimbursable on a pro-rata basis as a percentage of the completion of the applicable Work

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable under the Contract Documents, excluding, however, such sales or use taxes for which Owner is exempt under Texas law.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of the General Conditions or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment, directly related to the Work with the Owner's prior approval.

However, any such electronic equipment identified in Section 6.6.6 will be limited to the cost of personal computer hardware, printers, fax machines, and network equipment used at the field office in the normal day-to-day administration, management and control of the Project. The aggregate charges for any such hardware shall not exceed the fair market value of the hardware at the time it was brought to the field office. If the total charges for any particular piece of hardware reach an amount equal to the fair market value, that particular piece of hardware shall be turned over to the Owner whenever it is no longer needed for the Project. If the Construction Manager elects to keep the particular piece of hardware, the Contract Sum shall be credited with a mutually agreeable amount which shall represent the fair market value of the particular piece of hardware at the time it was no longer needed for the job.

§ 6.6.7 Deposits lost for causes due to the Owner's negligence or failure to fulfill a specific responsibility of the Owner in the Contract Documents.

§ 6.6.8 [Intentionally omitted.]

§ 6.6.9 Subject to the Owner's prior approval and to such limitation on commuting and travel expense as provided in Section 6.6.10 below, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

§ 6.6.10 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work other than commuting expense or travel between the Construction Manager's offices and the Project Site, but only to the extent such personnel's wages for such duties are reimbursable as Cost of the Work under this Article 6. Such expenses incurred by employees of the Construction Manager not permanently stationed at the field office must be approved in advance by the Owner. Commuting expenses are specifically not reimbursable.

Note: At the current time, it is not anticipated that any such costs will be necessary to staff the Project. If, however, the Construction Manager determines that such expenses will be necessary to properly staff the Project, the Owner's advance written approval will be required before any such costs are considered reimbursable.

§ 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of the General Conditions, provided that the emergency is not caused by the negligence or failure to fulfill a specific responsibility of the Construction Manager to the Owner as set forth in the Contract Documents or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors.

§ 6.7.3 Costs of repairing or correcting nonconforming Work executed by the Construction Manager or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier) and costs of repairing or correcting damage to the Work caused by the Construction Manager, or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier), provided that such damaged or nonconforming Work was not caused or contributed to by the negligence of the Construction Manager or its breach of its contractual obligations arising hereunder, and only to the extent that the cost of repair or correction is not recoverable (exercising reasonable commercial efforts) by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

(Paragraph deleted)

§ 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors, Sub-subcontractors (of any tier), and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to comply with or fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Rental costs of machinery and equipment, except as specifically provided in Section 6.5.2;

- .8 Costs, other than costs included in Change Orders approved by the Owner or costs recoverable under the Contract Documents for a Construction Change Directive issued by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
- .9 Sales, use or similar taxes imposed by a governmental authority related to the Work for which the Owner is exempt under Texas law;
- .10 Fines, penalties, sanctions or impositions assessed or imposed by any governmental body, instrumentality or tribunal arising from the fault of Construction Manager or its Subcontractors or any tier;
- .11 Costs incurred by Construction Manager resulting from the failure of Construction Manager or its Subcontractors to coordinate their work with that of Owner and its separate contractors, if any, after agreeing to the schedules therefor, or failure of Construction Manager to comply with directives of Owner not in conflict with said schedules; and
- .12 Subject to and as limited by Section 9.3.3 of the General Conditions, costs and expenses arising from Construction Manager's indemnity obligations, including but not limited to Construction Manager's costs and expenses in removing or defending against a mechanic's lien claim asserted against the Owner and/or its property.

§ 6.8.2 Costs to repair defective Work and other costs to comply with Construction Manager's warranty obligations under the Contract, except as may be expressly included in Section 6.7.3 above.

§ 6.9 Discounts, Rebates and Refunds

§ 6.9.1 All proceeds from sale of surplus materials and equipment shall accrue to the Owner and be credited to the Cost of Work. Cash or early payment discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment, dividends or refunds on any bond including performance and payment bonds, whether provided by the Construction Manager or Subcontractors, and rebates, dividends, and refunds of any insurance premiums and deposits shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

Construction Manager shall make reasonable efforts to provide Owner with timely notice of all available discounts, rebates, refunds and returns (hereinafter referred to collectively as "discounts"). The Construction Manager shall not obtain for its own benefit any discounts in connection with the Work prior to providing the Owner with reasonable, prior notice of the potential discount and an opportunity to furnish funds necessary to obtain such discount on behalf of the Owner in accordance with the requirements of this Paragraph. In the event that Construction Manager fails to provide Owner with timely notice of the availability of any discount, such discount shall accrue to (be credited against) the Cost of the Work.

§ 6.9.2 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.10 Related Party Transactions

§ 6.10.1 For purposes of Section 6.10, the term "Related Party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "Related Party" includes any member of the immediate family of any person identified above.

§ 6.10.2 Construction Manager shall not subcontract with or purchase labor or materials in connection with the Work of the Contract from a Related Party without the written consent of the Owner and compliance with Section 2.3.2.1 above.

§ 6.11 Accounting Records

In addition to the requirements set forth in Article 14 of the General Conditions, the Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary

for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and Blue Star and their auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract and the Work hereunder, including but not limited to all records and back-up documentation relating to reimbursable expenses and Cost of Work items. The Construction Manager shall preserve these records for a period of four years after final payment, or for such longer period as may be required by law.

ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

§ 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Owner and the Architect by the Construction Manager, on the form required or approved in writing by the Owner, including all supporting documentation as herein provided and in conformity with the requirements of the Contract Documents, and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents. On or before the 25th day of the month immediately preceding a month in which the Construction Manager will submit an Application for Payment, the Owner, the Architect (if required by the Owner) and the Construction Manager shall meet to review a preliminary draft of such Application for Payment (hereinafter referred to as a "Pencil Draw") prepared by the Construction Manager. The Construction Manager shall revise the Pencil Draw in accordance with any objection or recommendation of either the Owner or the Architect that is consistent with the requirements of the Contract Documents. Such revised Pencil Draw shall be re-submitted by the Construction Manager to the Owner as the Application for Payment due on or before the 5th day of the month immediately following the month in which the Pencil Draw was first submitted.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

§ 7.1.3 Provided that all conditions precedent to payment set forth in the Contract Documents have been satisfied, including but not limited to such documentation as required by the General Conditions, and an Application for Payment is received by the Owner and the Architect not later than the 5th day of the month, the Owner shall make payment of the certified amount to the Construction Manager not later than the last day of the same month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than forty-five (45) days after the Architect receives the Application for Payment.
(Federal, state or local laws may require payment within a certain period of time.)

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit complete and accurate job cost reports prepared in accordance with Generally Accepted Accounting Procedures detailing all disbursements and payments made or actual costs incurred by Construction Manager for its Reimbursable Conditions Costs and other costs directly incurred by Construction Manager, including its costs for payrolls, petty cash accounts, and invoices on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager, less (2) that portion of those for the period covered by the present Application for Payment. Pursuant to Section 6.11 above, Owner and its auditors shall be provided, upon written request, actual backup documentation to reflect those costs set out in the job cost reports submitted in support of each such Application for Payment. In addition to job cost reports, Construction Manager shall furnish copies of all invoices and applications for payment (with back-up documentation) submitted by Subcontractors (including suppliers) for Work performed by such Subcontractors (including suppliers furnishing materials directly to Construction Manager) during the period covered by the Application for Payment and for which payment is sought.

§ 7.1.5 Each Application for Payment shall be based on the most recent Schedule of Values submitted by the Construction Manager in accordance with the Contract Documents. The Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee and any Allowances and agreed-upon Construction Manager's Contingency shall be shown as single separate items. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the Owner and the Architect may require. This Schedule, unless objected to by the Owner or the Architect, shall be used as

a basis for reviewing the Construction Manager's Applications for Payment and determining the amount due for each such Progress Payment but shall not be considered as a basis for increasing or decreasing the GMP. The Schedule of Values shall not be modified or revised without the prior written consent of the Owner and the Construction Manager in each instance.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values.

§ 7.1.6.1 In addition to other required items, each Application for Payment shall be accompanied by the following documentation, statements and information, all in form and substance approved by the Owner and in compliance with applicable state statutes:

- (A) a duly executed statement from Construction Manager detailing all moneys paid out or costs incurred by it on account of the Cost of the Work and for which payment is sought;
- (B) with regard to payments sought for work (labor and materials) furnished by Subcontractors (including vendors or material suppliers), Construction Manager must identify all Subcontractors for whose work payment is being sought in the Application and, in addition to providing such supporting documentation as may be reasonably required or requested by the Owner, provide, for each such Subcontractor the following information: (1) a brief description of the Work performed for which payment is being sought, (2) the agreed upon price or value of the Work, (3) the amount to be retained or withheld from the Subcontractor, and (4) the amount requested for payment to the Subcontractor;
- (C) with regard to work performed by Construction Manager or its own forces, Construction Manager must provide an accurate description of the work performed and for which payment is sought, including such supporting documentation required by this Agreement;
- (D) a statement, under oath, by Construction Manager that all bills or obligations incurred by Construction Manager, for which previous Applications for Payment have been submitted and paid by Owner, have been paid by Construction Manager, or, if some bill or obligation remains outstanding, the statement shall fully disclose the outstanding bill or obligation by stating the name of the person or entity to whom the bill or obligation remains outstanding, the amount of the outstanding bill or obligation, and the basis or reason why such bill or obligation has not been paid;
- (E) a statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Contract, other than any claim which has been fully paid and duly released or is included in the Application for Payment and fully described in subparagraph (A) immediately above, or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid;
- (F) a duly executed Waiver and Release from the Construction Manager waiving all claims for payment for the work (and claims for liens arising therefrom) covered by previously paid Applications for Payment (less identified retainage and any other identified holdbacks from payment) and waiving all such liens or claims for payment for the work covered by the Application for Payment being submitted, conditioned only upon receipt of the payment being requested; and
- (G) duly executed Waivers and Releases from each (first-tier) Subcontractor for whom payment is being sought waiving all liens or claims for payment for the work covered by previously paid Applications for Payment (less identified retainage and any other identified holdbacks from payment) and waiving

all liens or claims for payment for the work covered by the Application for Payment being submitted, to the extent of payment received.

§ 7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- (A) Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values or as otherwise provided hereinabove, not to exceed the actual cost of such Work incurred by the Construction Manager for such period, less the retainage to be withheld as provided hereinbelow. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of the General Conditions;
- (B) If approved by Owner in advance, add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing, less the retainage to be withheld as provided hereinbelow;
- (C) Add the Construction Manager's Fee, less retainage of five percent (5%). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- (D) Subtract retainage of five percent (5%) from that portion of the Construction Manager's Self-Perform Work authorized hereunder;
- (E) Subtract the aggregate of previous payments made by the Owner;
- (F) Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- (G) Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the General Conditions and such other amounts, if any, for which the Owner is authorized to withhold from payment under the terms of the Contract Documents.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%). Notwithstanding the foregoing, payments to Construction Manager shall be not subject to retainage for Reimbursable Conditions Costs incurred by Construction Manager and for direct purchases or rentals by Construction Manager of materials, appliances, and equipment, when such retainage is not commercially feasible.

§ 7.1.8.1 Construction Manager shall make such payments included in Construction Manager's Application for Payment to its Subcontractors within the earlier of seven (7) days after receipt of payment from Owner or such time period as required by Applicable Law, and consistent with the requirements of Section 9.6.2 of the General Conditions. Construction Manager shall not retain funds from its Subcontractors to the extent such funds have been requested from Owner and payment has been made to Construction Manager.

§ 7.1.9 Except with the Owner's prior written approval or as otherwise provided in Section 7.1.12 below, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Owner and the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

§ 7.1.11 Any reduction or release of retainage, or portion thereof, shall not be a waiver of (1) any of the Owner's rights to retainage in connection with other payments to the Construction Manager or (2) any other right or remedy that the Owner has under the Contract Documents, at law or in equity.

§ 7.1.12 Construction Manager shall be entitled to payment for materials suitably stored off the site at a location agreed upon in writing by Owner and Owner's Lender, conditioned on the following:

- a. evidence satisfactory to Owner that the stored materials are included in the coverage of insurance policies naming the Owner as a loss payee and Owner's Lender as a mortgagee and loss payee;
- b. bills of lading, invoices, and/or bills of sale satisfactory to Owner from the seller, supplier, or fabricator of the stored materials, evidencing the cost of such stored materials and that, upon payment, ownership thereof will vest in the Owner, free of any liens or claims of third parties; and
- c. *verification (which may, at Owner's election, include physical inspection by Owner or its designated representative) of delivery and suitable storage of such materials in a bonded warehouse or storage yard approved by the Owner (including the Owner's approval of the terms of such storage).*

§ 7.2 Final Payment

§ 7.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall not be made by the Owner to the Construction Manager until all of the following **conditions precedent to final payment** have occurred or been fully satisfied:

- (A) the Construction Manager has fully performed the Contract, including all punchlist work except for the Construction Manager's responsibility to correct previously performed Work as provided in Section 7.2.2 of the General Conditions and to satisfy other requirements, if any, which extend beyond final payment or which otherwise necessarily survive final payment;
- (B) the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment in conformity with the requirements of the Contract Documents in such time as to give (i) to the Owner's auditor sufficient time as provided in Section 7.2.2 to complete its report, (ii) to the Architect sufficient time as provided in Section 7.2.2 for the issuance of the Architect's final Certificate for Payment, (iii) to the Construction Manager sufficient time provided for its notice of disputed amount to the auditor's report (or the deadline for such notice having passed), and (iv) to the Owner no less than seven days after the last of the foregoing to occur in order to make such final payment;
- (C) a final Certificate for Payment has been issued by the Architect;
- (D) the Construction Manager has provided its notice of disputed amount to the auditor's report, provided written acceptance of the auditor's report, or has waived any objection to the auditor's report as provided by Section 7.2.3;
- (E) the Construction Manager has fully complied with the requirements set forth in Section 7.2.1.1 below and Section 9.10 of the General Conditions; and
- (F) any other conditions precedent to final payment expressly set forth in the Contract Documents have been satisfied.

§ 7.2.1.1 The conditions precedent to final payment, which are for the sole benefit of the Owner (and the third-party beneficiaries to this Contract, if any), and not the Construction Manager or its Surety, and which may be waived in whole or in part by Owner, in its sole discretion, shall also include the following:

(A) TO BE DELIVERED / FURNISHED PRIOR TO OR WITH THE APPLICATION FOR FINAL PAYMENT:

- (1) *With its final Application for Payment, Construction Manager shall furnish to Owner a release and waiver of the Construction Manager's lien rights and all claims for payment arising under the Contract, unconditioned with regard to all prior payments received (as identified therein) and conditioned (only) with regard to the receipt of the final payment identified therein.*

- (2) *With its final Application for Payment*, Construction Manager shall furnish to Owner a Final Bills Paid Affidavit which conforms to the provisions of the Contract and Applicable Law and which truthfully states that all bills or obligations incurred by Construction Manager through the final completion of the Work have been paid or are as expressly identified and set forth in the Affidavit. Amounts unpaid or claimed to be owed by Construction Manager (including claims asserted by Subcontractors, whether or not disputed by Construction Manager), including such amounts to be paid to Subcontractors from the final payment requested by Construction Manager, shall be fully identified in the Affidavit (by name of person to whom payment is owed or who is claiming payment and the amount owed or claimed to be due).

Such Final Bills Paid Affidavit shall include a statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Contract, other than any claim which has been fully paid and duly released or is included in the final Application for Payment or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid. Such Final Bills Paid Affidavit shall also include an express representation and warranty by the Construction Manager that Construction Manager shall pay each person or entity identified in the Affidavit the amount stated therein within ten (10) days after receipt of the funds requested in the Request for Final Payment.

- (3) *Prior to or with its final Application for Payment*, Construction Manager shall furnish to Owner a full, final, and unconditional release and waiver of lien and of all claims for payment arising under the Contract from each such Subcontractor who has received full and final payment prior to the submission of the Construction Manager's final Application for Payment.

- (4) *With its final Application for Payment*, Construction Manager shall furnish to Owner a release and waiver of lien and all claims for payment arising under the Contract from each such Subcontractor who has not received full and final payment prior to the submission of the Construction Manager's final Application for Payment, such release and waiver being conditioned only upon receipt of payment of the specified amount of the final payment owed to the Subcontractor which matches the amount disclosed to be due to or claimed by the Subcontractor in the Construction Manager's Final Bills Paid Affidavit required under Subsection (A) (2) above.

If Construction Manager and a Subcontractor have a dispute with regard to the amount of the final payment owed to the Subcontractor, such Subcontractor's conditional release and waiver of lien shall state the amount claimed by Subcontractor and the dispute fully identified in the Construction Manager's Final Bills Paid Affidavit.

(B) TO BE DELIVERED / FURNISHED AT OR BEFORE FINAL PAYMENT (AS PROVIDED BELOW):

- (1) *On or prior to receipt of final payment* (in sufficient time prior to final payment in order for Owner to verify Construction Manager's compliance with the requirements hereof), Construction Manager shall deliver any special guarantees or warranties required by the Contract Documents and assignments of all guarantees or warranties from Subcontractors, vendors, suppliers, or manufacturers (with the addresses and telephone numbers of those Subcontractors or other persons providing guarantees and warranties).
- (2) *On or prior to receipt of final payment* (in sufficient time prior to final payment in order for Owner to verify Construction Manager's compliance with the requirements hereof), Construction Manager shall have delivered to Owner three (3) complete sets and one electronic set of Record Documents, reflecting the "As-Built" conditions of the Project at final completion, including, without limitation, all warranties, manuals, instructions, reports, and other such documentation as Owner may have previously requested.
- (3) *On or prior to receipt of final payment*, Construction Manager shall furnish to Owner a release of claim and waiver of lien from each Subcontractor who has furnished a notice of claim in attempted compliance with Section 53.056 or 53.057 of the Texas Property Code. If such release is conditional upon receipt of payment by such Subcontractor, Construction Manager shall amend its Final Bills Paid Affidavit furnished in accordance with Subsection (A) (2) above (if necessary) to include such amount of the claim for which receipt of payment is conditioned, together with Construction Manager's representation and warranty to Owner with regard to Construction Manager's payment to the Subcontractor. If Construction Manager is unable to secure such release of claim and waiver of lien from a Subcontractor, final payment shall be conditioned upon Construction Manager bonding around such claim in accordance with Subchapter H of Chapter 53, Texas Property Code, or by providing such other security acceptable to Owner to indemnify Owner from such direct claim of payment by Subcontractor against Owner and to indemnify the property from any asserted lien claim by Subcontractor, including indemnity for legal costs to defend against and/or remove such lien claim.
- (4) *Contemporaneous with the receipt of final payment*, Construction Manager shall furnish a full and final, unconditional release and waiver of the Construction Manager's lien rights and all claims for payment arising under the Contract through the final completion of the Work, except for such amount, if any, in dispute with Owner under Section 7.2.3, which amount shall be clearly identified and reserved in such release and waiver. If Construction Manager has received final payment by cashier's check or by such other means as to constitute actual receipt by Construction Manager of such funds at the time of the final payment (not subject to collection or subsequent actual receipt of funds), Construction Manager shall furnish such release and waiver to Owner at the time such final payment is received by Construction Manager. Otherwise, Construction Manager shall tender such release and waiver in trust to an escrow agent or legal counsel, as mutually agreed by Owner and Construction Manager, with such release and waiver to be delivered to the Owner upon Construction Manager's actual receipt of such funds.
- (5) *Contemporaneous with the receipt of final payment*, Construction Manager shall furnish an amended Final Bills Paid Affidavit to reflect and fully identify any adjustments made with regard to the amount, if any, in dispute with Owner under Section 7.2.3 and adjustments arising from payment disputes with Subcontractors (see Subsection (B) (3) above) as of the date of the final payment.

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting of the Work within thirty (30) days after delivery of the final accounting to the Owner by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven (7) days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment for the Work with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the

Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the General Conditions. The time periods stated in this Section supersede those stated in Section 9.4.1 of the General Conditions. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without seeking an initial decision, if required pursuant to Section 15.2 of the General Conditions. A notice of the disputed amount shall be made by the Construction Manager to the Owner within twenty-one (21) days after the Construction Manager's receipt of a copy of the Owner's audit report. Failure to submit such notice within this 21-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount, if any, certified in the Architect's final Certificate for Payment.

(Paragraph deleted)

§ 7.2.4 Provided all other conditions to final payment have been met, the Owner's final payment to the Construction Manager shall be made within seven days after the later of: (a) twenty-one days (21) days after the date required hereunder for the issuance of the Architect's final Certificate for Payment, (b) the date Owner has received Construction Manager's notice of disputed amount to the auditor's report or the deadline for such notice has passed under Section 7.2.3, or (c) forty-five days (45) after the final completion of the Work under the Contract, other than warranty Work or replacement or repair of damaged or non-conforming Work (provided such damage or non-conformance was discovered after Substantial Completion of the Work). The amount of the final payment (less such amount in dispute under Section 7.2.3 and expressly identified and reserved by Construction Manager) shall be calculated as follows:

- .1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price as finally adjusted.
- .2 Subtract such amounts, if any, which the Architect withholds, in whole or in part, in connection with a final Certificate for Payment as provided in Section 9.5.1 of the General Conditions and such amounts to which the Owner is entitled to withhold from final payment.
- .3 Subtract the aggregate of previous payments made by the Owner for the Work.

§ 7.2.5 If, subsequent to Final Payment and at the Owner's request, the Construction Manager incurs costs described in Article 6 (and not excluded from reimbursement under Section 6.8) to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to Final Payment, but not in excess of the Guaranteed Maximum Price.

§ 7.2.6 At Owner's election, Owner may issue a joint check payable to the Construction Manager and the respective Subcontractor for the amount owed or claimed by the Subcontractor to be owed to the Subcontractor. In such case, the Construction Manager and the Subcontractor shall unconditionally release the Owner and any lien on the Owner's property with regard to all payment due for the Work performed by the Subcontractor.

§ 7.2.7 If any Subcontractor or supplier refuses to furnish such a release or in the event that a claim for payment or lien has been asserted by a Subcontractor or supplier furnishing work to the Project, Construction Manager shall furnish a surety bond reasonably acceptable to Owner to release such claim against Owner and lien, if any, and otherwise fully comply with the Contract and Applicable Law. If the Construction Manager should fail to obtain a surety bond following the Owner's request, the Owner may, at its option, obtain the surety bond and back-charge the Construction Manager the costs of obtaining the surety bond or continue to withhold such sum as determined, in good faith, by the Owner to be reasonably necessary to protect itself from loss or damage arising from such claim.

ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of the General Conditions and as set forth in the **Insurance and Surety Requirements** attached hereto as **Exhibit D** and fully incorporated herein.

(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201–2007.)

Type of Insurance or Bond
n/a

Limit of Liability or Bond Amount (\$0.00)

ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any claim or dispute between the Owner and Construction Manager shall be subject to mediation as provided in this Section 9.1.

§ 9.1.1 The Owner and Construction Manager shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement or as otherwise agreed by the parties. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§ 9.1.2 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the Dallas-Fort Worth metropolitan area, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 9.1.3 If the parties do not resolve a dispute through mediation pursuant to this Section 9.1, the method of binding dispute resolution shall be the following: litigation in a state District Court located in the County in which the Project is located or in a United States District Court of the Northern District of Texas.

§ 9.2

(Paragraphs deleted)

The provisions regarding dispute resolution shall survive completion and termination of the Contract.

§ 9.3 Initial Decision Maker

The person or entity noted below will serve as the Initial Decision Maker (if any) pursuant to Section 15.2 of the General Conditions for Claims arising from or relating to the Construction Manager's Construction Phase services:

(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)

[Redacted]

ARTICLE 10 TERMINATION OR SUSPENSION

§ 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price

§ 10.1.1 Prior to the execution of the GMP Amendment, the Owner may terminate this Contract upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Contract, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of the General Conditions.

§ 10.1.2 In the event of termination of this Contract pursuant to Section 10.1.1, the Construction Manager shall, as its sole and exclusive remedy, be compensated for Preconstruction Phase services performed prior to receipt of a notice of termination consistent with any compensation terms pursuant to Section 4.1 above. Notwithstanding the foregoing, the compensation under this Section shall not exceed the compensation set forth in Section 4.1.

§ 10.1.3 If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the GMP Amendment, the Owner shall pay to the Construction Manager an amount

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calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1 Take the Cost of the Work incurred by the Construction Manager for the Work to the date of termination;
- .2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work for the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services for the Work and such amounts which the Owner is authorized to withhold from the Construction Manager by Applicable Law or the Contract.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. Construction Manager's recovery as expressly authorized under this Section 10.1.3 shall be Construction Manager's sole and exclusive remedy in the event of the Owner's termination of the Contract pursuant to Section 10.1.1 above. Notwithstanding the foregoing, the total amount to be paid by Owner to Construction Manager, including all sums previously paid, shall not exceed the Guaranteed Maximum Price.

§ 10.1.3.1 To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

§ 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price

Following execution of the GMP Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of the General Conditions.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of the General Conditions shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the GMP Amendment, the amount payable to the Construction Manager under Section 14.1.3 of the General Conditions shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above.

§ 10.3 Suspension

The Work may be suspended by the Owner as provided in Article 14 of the General Conditions. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of the General Conditions, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

§ 10.4 NOTE – Limitation of Damages upon Termination: Construction Manager agrees that, upon Construction Manager's termination for cause (or Owner's termination for convenience), Construction Manager's recovery for damages and lost profits, if any, for Owner's breach (or early termination), shall be limited as set forth in this Article 10 of the Agreement and in Article 14 of the General Conditions.

ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in the General Conditions.

§ 11.2 Ownership and Use of Documents

Section 1.5 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

§ 11.3 Governing Law

Section 13.1 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

§ 11.4 Assignment

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Contract. The Construction Manager shall not assign this Contract without the written consent of the Owner.

Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, assign this Contract and Owner's rights hereunder as provided in Section 13.2 of the General Conditions. In addition to and without limiting its rights under Section 13.2 of the General Conditions, Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, also assign the rights arising under this Contract to any of the third-party beneficiaries to this Contract expressly identified in the Contract Documents and to any specially created entity owned or controlled by the Owner, provided such entity is or becomes the owner of the property on which the improvements are constructed pursuant to the Construction Contract.

§ 11.5 Other provisions:

§ 11.5.1 Those other documents forming part of this Agreement, and incorporated herein by reference, are as follows:

Exhibit A -- Project Site Description

Exhibit B -- List of Designated Representatives and Contact Persons [including Construction Manager's Senior Project Personnel]

Exhibit C -- Construction Manager's Personnel Rates Schedule

Exhibit D -- Insurance and Surety Requirements

Exhibit E -- Change Order Pricing

§ 11.5.2 CONSTRUCTION MANAGER'S DESIGNATED REPRESENTATIVE.

The Construction Manager's designated representative(s) for the Project is (are) set forth in the **List of the Designated Representatives and Contact Persons** attached hereto as **Exhibit B** and incorporated fully herein, who shall have express authority to bind the Construction Manager and who shall render decisions and furnish information promptly when reasonably requested by Owner, so as to avoid unreasonable delay in the services or work of the Construction Manager.

§ 11.5.3 CHANGES IN WORK. As a condition precedent to an increase in the Guaranteed Maximum Price, an extension of the Contract Time, or a recovery of the Cost of Work for performing work outside the scope of this Contract, the Construction Manager must, prior to the performance of any such work, obtain the approval of the Owner in accordance with the Contract Documents. Such prior approval must be obtained by a Change Order agreed to and executed by the parties pursuant to Section 7.2 of the General Conditions or by a Construction Directive issued by the Owner pursuant to Section 7.3 of the General Conditions.

§ 11.5.4 LIMITATION OF REMEDIES FOR DELAY. Except as otherwise provided herein, extensions of time shall be the Construction Manager's sole remedy for any delay, unless the delay shall have been caused by acts constituting

interference by Owner with the Construction Manager's performance of the Work, and then, only to the extent that such acts continue after the Construction Manager has provided written notice to Owner of such interference. The Owner's reasonable exercise of any of its rights or remedies under the Contract Documents, regardless of the extent or frequency, shall not under any circumstances be construed as intentional interference with the Construction Manager's performance of the Work.

§ 11.5.5 CONSTRUCTION MANAGER'S REPRESENTATIONS. The Construction Manager represents and warrants the following to the Owner (in addition to any other representations and warranties contained elsewhere in the Contract Documents) as an inducement to the Owner to execute this Agreement and the GMP Amendment (at the time the GMP Amendment is agreed to and executed by the parties):

- .1 that it will perform all Work called for hereunder in a good and workmanlike manner and in accordance with all legal requirements and the Contract Documents;
- .2 that it shall strictly comply with and satisfy all legal requirements applicable to the Construction Manager's means and methods of the Work;
- .3 that it is financially solvent, able to pay its debts as they mature and possesses sufficient working capital to complete the Work and perform its obligations hereunder;
- .4 that it possesses a high level of experience and expertise in the business administration, construction, construction management and superintendence of projects of the size, complexity and nature of the project to be constructed at the site, and it will perform the Work with the care, skill, and diligence of such a contractor;
- .5 that it is able to furnish the tools, materials, supplies, equipment, and labor required to complete the Work and perform its obligations hereunder;
- .6 that it is authorized to do business in the municipality in which the Project is located and properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the Work and the site of the Project;
- .7 that its execution of the Agreement (and the GMP Amendment) and its performance hereunder are within its duly authorized powers; and
- .8 that it understands the restrictions imposed on the handling of construction payments received by the Owner pursuant to any Applicable Law and that it will fully comply with those provisions in the handling of all payments made by the Owner to the Construction Manager pursuant to this Agreement.

The foregoing warranties are in addition to, and not in lieu of, any and all other liability imposed upon the Construction Manager by law with respect to the Construction Manager's duties, obligations and performance hereunder. The Construction Manager's liability hereunder shall survive the Owner's final acceptance of and payment for the Work. All representations and warranties set forth in this Agreement, including, without limitation, this paragraph, shall survive the final completion of the Work or the earlier termination of this Agreement. The Construction Manager acknowledges that the Owner is relying on these representations and warranties in entering into this Agreement with Construction Manager.

§ 11.5.6 RESPONSIBILITY FOR PERMITS AND FEES. Notwithstanding Section 3.7 of the General Conditions (which this provision shall supersede to the extent in conflict therewith) and except as may otherwise be agreed in the GMP Amendment, the parties shall be responsible for and pay those certain permits and fees as follows:

Owner shall obtain and pay for the building permit. Construction Manager shall be responsible for all other trade permits and inspection fees as provided in Section 3.7 of the General Conditions.

Notwithstanding the foregoing, upon Owner's request and at no increase to the GMP, Construction Manager shall provide reasonable assistance to the Owner in securing the building permit, including paying for (subject to Owner's direct reimbursement to Construction Manager outside the Contract Sum) and picking up the issued permit.

§ 11.5.7 ATTORNEY'S FEES. If any action at law or in equity, including an arbitration proceeding, is necessary to enforce or interpret the terms of the Contract, the Court or the arbitrator(s), as applicable, shall determine the prevailing party and award to such prevailing party, in addition to any other relief to which such party is entitled to

recover, its reasonable attorneys' fees, expert witness fees, costs, and other reasonable expenses incurred in such proceeding.

§ 11.5.8 AUTHORITY OF ARCHITECT. Notwithstanding any contrary provision hereof or of any Contract Document, no consent, decision, determination, approval or certification to be made by Architect hereunder shall be binding upon Owner unless and to the extent agreed to in writing by Owner.

§ 11.5.9 AUTHORITY OF EACH SIGNATORY. Each signatory hereto represents that it has the authority to execute this Contract on behalf of the respective named party.

§ 11.5.10 LENDER'S REQUIREMENTS. Construction Manager shall provide, upon Owner's request, to the lender or lenders (if any) furnishing financing for the development and construction of the Project (referred to herein collectively as the "Owner's Lender") any Project information that such lender(s) or its (their) designated representatives reasonably require or any such certification that Construction Manager is obligated to provide to the Owner under the Contract Documents. The Construction Manager further agrees, upon Owner's request, to execute such documents as may be reasonably required by the Owner's Lender furnishing financing for the development and construction of the Project and which are consistent with reasonable commercial practices for the financing of a project of the size and scope of the Project, including but not limited to, the following: (a) a subordination of Construction Manager's lien rights (including an lien on removables or fixtures) to any liens of the Owner's Lender securing any obligations arising from the Project; (b) an agreement by Construction Manager to provide notice prior to suspension of the Work or termination of the Contract by Construction Manager and providing Owner's Lender with a reasonable opportunity to cure Owner's default; (c) a contingent assignment of this Agreement to the Owner's Lender in the event of a default by Owner under this Contract or under the documents creating the loan(s), provided that Construction Manager shall not be required to perform additional work for lender unless Owner's Lender has assumed responsibility for payment of such additional work; (d) an agreement by Construction Manager to certify its compliance with the requirements of the Contract Documents; and (e) an acknowledgement that no Change Order or Construction Change Directive resulting in a material increase in the Contract Time or the Cost of the Work will be effective without the consent of Owner's Lender.

§ 11.5.11 MULTIPLE ORIGINAL COUNTERPARTS. This Contract may be executed in multiple original counterparts, each of which shall be of equal dignity. Faxed or electronically scanned signatures shall be sufficient for the execution and delivery of this Contract.

§ 11.5.12 PARTIAL INVALIDITY DOES NOT INVALIDATE CONTRACT. The invalidity of any part or portion of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.

§ 11.5.13 SURVIVAL. All provisions of the Contract which by their nature survive termination of this Contract or final completion of the Work, including, without limitation, all warranties, indemnities, indemnity obligations, confidentiality obligations, and obligations to arbitrate disputes, shall remain in force and effect after final completion or any termination of the Contract.

ARTICLE 12 SCOPE OF THE CONTRACT

§ 12.1 This Contract represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Contract may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the Contract: see Article 1 above.

This Agreement is entered into as of the day and year first written above.

OWNER:

Init.



By: _____

Name: _____

Title: _____

CONTRACTOR [CONSTRUCTION MANAGER]

By: _____

Name: _____

Title: _____

|

|

| (Table deleted)



Init.

/

Additions and Deletions Report for AIA[®] Document A133[™] – 2009

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

Note: This Additions and Deletions Report is provided for information purposes only and is not incorporated into or constitute any part of the associated AIA document. This Additions and Deletions Report and its associated document were generated simultaneously by AIA software at 10:33:36 on 10/23/2013.

PAGE 1

AGREEMENT made as of the day of in the year Two Thousand Thirteen (2013)

...

(Name, legal status and address)

City of Frisco, Texas
6101 Frisco Square Blvd.
5th Floor
Frisco, TX 75034
Attn: George Purefoy, City Manager
(see address for notice purposes in **Exhibit B**)

...

To be determined
(see address for notice purposes in **Exhibit B**)

...

ARBJ File: Frisco 870008 0644 Stadium Project
Stadium Tract Facilities

...

M. Arthur Gensler Jr. & Associates, Inc.
Two Lincoln Centre
5420 LBJ Freeway, Suite 1100
Dallas, TX 75240
(see address for notice purposes in **Exhibit B**)

...

See **Exhibit B**.

PAGE 2

See **Exhibit B**.

...

See **Exhibit B.**

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~~The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein.~~ § 1.1.1 The Contract Documents consist of this Agreement, the AIA A201-2007 General Conditions of the Contract for Construction as modified by the Owner and the Construction Manager (referred to herein as the "General Conditions"), Supplementary and other Conditions (if any) identified in this Agreement, Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein.

Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price ~~proposal, proposal~~ (the "GMP Proposal"), the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. All sections of the Project Manual shall be a part of the Contract Documents, including the bid proposal form signed by the Construction Manager, and the Request for Proposals.

The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. ~~If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.~~ Where reference is made in this Agreement or the Contract Documents to the AIA Document A201-2007, General Conditions of the Contract for Construction ("A201-2007" or the "General Conditions"), the reference refers the version of the AIA Document 201-2007 as modified by the Owner and the Construction Manager (identified as the "Contractor" therein).

§ 1.1.2 If, and to the extent of, any inconsistency, ambiguity, or discrepancy in the Contract Documents, precedence shall be given to the Contract Documents in the following order of priority: (1) written Modifications issued after execution of this Agreement, including the GMP Amendment, with the Modification bearing the latest date taking precedence; (2) this Agreement, including the exhibits attached hereto and incorporated fully herein, but not including the General Conditions; (3) Addenda issued prior to the execution of this Agreement, with the Addenda bearing the latest date taking precedence; (4) the General Conditions; (5) the Final Drawings and Specifications; and (6) the Preliminary Drawings and Specifications, with those bearing the latest date taking precedence. Without limiting the foregoing, the terms of the Agreement and the General Conditions shall control over any terms in the Drawings or Specifications inconsistent therewith.

§ 1.1.3 A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, (4) or a Minor Change Directive issued by the Owner in accordance with Section 7.4 of the General Conditions. Unless specifically enumerated in this Article 1 above, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Construction Manager's bid or proposal, or portions of Addenda relating to bidding requirements.

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The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner and Blue Star and their project representatives and the Architect and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

...

For the Preconstruction Phase, ~~AIA Document A201™ 2007, General Conditions of the Contract for Construction,~~ the General Conditions shall apply only as specifically provided in this Agreement. For the Construction Phase, the ~~general conditions~~ General Conditions of the ~~contract~~ Contract shall be as set forth in A201–2007, ~~which document is incorporated herein by reference.~~ as modified by the parties hereto (the General Conditions as identified in Section 1.1 above). The term "Contractor" as used in ~~A201–2007 shall mean the Construction Manager.~~ the General Conditions shall mean the Construction Manager.

§ 1.4 Owner's Construction Consultant (Blue Star)

§ 1.4.1 Owner has retained the services of Blue Star Stadium, Inc. ("Blue Star") as a consultant in connection with the design and construction of the Project. Blue Star also has certain rights arising under this Contract as further described in Article 2 of the General Conditions.

§ 1.4.2 Construction Manager shall deliver to Blue Star accurate, complete copies of all notices or written communications given by the Construction Manager to the Owner, including but not limited to all such notices or communications required to be given by the Contract Documents, prior to or simultaneously with the delivery to the Owner. Notice provisions in the Contract Documents that are silent with regard to notice to Blue Star shall not be construed to mean that notice is not required to be given to Blue Star, even though specific provisions expressly require notice to Blue Star. No notice required to be provided to the Owner under the Contract Documents shall be effective until and unless also delivered to Blue Star. All meetings, conferences, and consultations between Owner and Construction Manager shall include Blue Star.

§ 1.4 DEFINITIONS

§ 1.4.1 The following terms as used in the Contract Documents shall have the meanings set forth below:

- .1 "Agreement" – this AIA® Document A133 – 2009, Standard Form of Agreement between Owner and Construction Manager (where the Construction Manager is also the Constructor), as modified by the parties and executed below, together with the Exhibits listed in Section 11.5.1 and attached hereto.
- .2 "Applicable Law" or "Applicable Laws" -- all laws, statutes, ordinances, regulations, guidelines or requirements now in force or hereafter enacted by any applicable Governmental Authority relating to or affecting the Project or arising from the Construction Contract, including, if and as applicable (1) the United States Occupational Safety and Health Administration requirements, (2) the Americans with Disabilities Act requirements, (3) requirements under Title VII of the Civil Rights Act of 1964, as amended, (4) the Age Discrimination in Employment Act requirements, (5) applicable building codes and zoning requirements of the City, (6) storm water, street, utility and other related infrastructure requirements, and (7) requirements related to the use, removal, storage, transportation, disposal and remediation of Hazardous Materials.
- .3 "Architect" – means the licensed design professional (whether such professional is a licensed architect or engineer) identified above as the "Architect", any replacement retained by the Owner (in the event of the termination of the design professional identified above), and such other person or entity designated in writing by the Owner to assume the responsibilities of the Architect under the Contract Documents in accordance with Section 4.1.3 of the General Conditions. Owner shall also reserve the right to retain one or more separate engineering consultants with regard to the design of the Project ("Owner's Engineering Consultants").
- .4 "Contract Documents" -- those documents as described in Section 1.1, including the Exhibits listed in Section 11.5 of this Agreement.
- .5 "Contract" – the contractual agreement between the Owner and the Construction Manager for the construction of improvements and such other required services for the Project, created by this Agreement, including the Exhibits attached hereto and incorporated herein, the General Conditions, and the other Contract Documents.
- .6 "Construction Manager's Reimbursable Conditions Costs" – those administrative and supervisory personnel costs, direct project overhead, and other onsite costs and expenses incurred by Construction Manager in the performance of its administrative, supervisory, and management responsibilities under the Contract and reimbursable as Cost of the Work pursuant to Article 6. Such costs shall include, to the extent reimbursable as Cost of the Work pursuant to Article 6, the costs to furnish insurance,

bonding, and utilities and to perform incidental work, including minor field labor performed by Construction Manager's employees, and the purchase of materials in connection therewith.

- .7 "Governmental Authority" or "Governmental Authorities" -- any federal, state and/or local agency, department, commission, board, bureau, administrative or regulatory body or other instrumentality having jurisdiction over the Project, including any public sector board, agency, or body which has been authorized by a Governmental Authority to exercise some portion of its jurisdiction over the Project.
- .8 "Project Site" -- that portion of the real property on which the Work is to be performed by Construction Manager or under which Construction Manager has control and Construction Manager's operations under the Contract are being performed, as more particularly described or identified in **Exhibit A** attached hereto.
- .9 "Self Perform Work" -- Work, other than supervision of the Work and minor Work in connection with Construction Manager's administrative and supervisory activities during the Construction Phase, that Construction Manager intends to perform by the Construction Manager's own forces, if authorized by Owner and the requirements hereof.
- .10 "Separate Contractor" -- when referring to a Separate Contractor of the Owner, shall be a contractor or supplier with whom Owner has contracted directly, other than the Construction Manager, to furnish materials or perform work at the Project Site.
- .11 "Indemnified Parties" -- those persons or entities identified or described in Section 3.18.1 of the General Conditions as "Indemnified Parties".

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The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may ~~agree, in consultation with the Architect,~~ agree for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

...

The Preconstruction Phase shall commence upon the date specified in a Notice to Proceed for Pre-Construction Phase Services issued by the Owner and shall continue through completion of the Construction Documents and procurement of all major Subcontractor agreements. Construction Manager is not entitled to reimbursement for any costs incurred for Pre Construction Phase Services performed before issuance of the first Notice to Proceed. Pre-Construction Phase Services may overlap with Construction Phase Services.

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The Construction Manager shall schedule and conduct meetings with the ~~Architect~~ Architect, Blue Star, Owner's Engineering Consultants (as applicable), and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall ~~advise the Owner~~ consult with the Owner, Blue Star, Owner's Engineering Consultants (as applicable), and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the ~~Owner~~ Owner, Blue Star, and Architect on constructability; availability of materials and labor; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically ~~update a Project schedule for the Architect's review and the Owner's acceptance.~~ (as reasonably requested by Owner, but no less than monthly) update a **Project Schedule** for review by Architect and

Blue Star and the Owner's approval. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule-Schedule relating to the performance of the Architect's services. The Project schedule-services, including the issuance of design packages. The Project Schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner. Schedule shall include proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a GMP Proposal (as defined below) for the Work, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed Critical Milestones (if any) and required date(s) of Substantial Completion. If preliminary Project Schedule updates indicate that previously approved Schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

...

The Construction Manager shall provide recommendations with regard to accelerated or fast track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.
§ 2.1.4.1 The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project . The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§ 2.1.4.2 The Work may be divided into one or more phases or packages which will be ready for commencement of construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Work. If the Owner elects to proceed before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any such phases or packages of the Work identified by the Owner. No Work, however, will be authorized to commence hereunder until the parties have entered into a written "Work Authorization Amendment" to this Agreement (see Section 2.2.10 below) which describes the Work to be performed thereunder, establishes a Guaranteed Maximum Price (a "Not to Exceed Price") for such Work, and establishes such Interim or Substantial Completion Dates for such Work as the parties may agree. Execution by Owner and delivery to Construction Manager of such a Work Authorization Amendment shall constitute Notice to Proceed for the Work specified therein but shall not constitute the commencement of the Work for purposes of computing the Contract Time requirements under Section 2.3.3 below, except as otherwise expressly provided in the respective Work Authorization Amendment. Construction Manager shall be allowed % of the Cost of the Work for its Fee for any such Work Authorization Amendment until such time as a Guaranteed Maximum Price for the entire Work is agreed upon by the parties in which case Section 5.1.1 shall control with respect to the total fee to be paid. When a Guaranteed Maximum Price for the entire Work is agreed upon by the parties, the fee shall be adjusted, if appropriate, as provided in Section 5.1.1 below and an appropriate credit shall be given by Construction Manager to any fees paid pursuant to any Work Authorization Amendments.

...

Completion deadlines with regard to the Project cannot reasonably be extended. When the design drawings are complete and all of the design packages have been bid by trade contractors, it will be too late in the process to substantially redesign the Project to meet the project budget. For that reason, it is the desire of the Owner to recognize any likely budget overruns as soon as possible, and by this Contract it is employing the Construction Manager to do the design monitoring, estimating, value engineering ("value analysis") and other functions to help the Owner meet the project budget. At any time that Construction Manager develops reasonable concerns based on their skill and experience about the integrity of the project budget or viability of the schedule, Construction Manager is to promptly advise the Owner, Blue Star, and Architect of the concerns, and make recommendations in the best interests of the Owner's Project goals.

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the ~~Architect~~, Architect and Owner's Engineering Consultants, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for ~~the Architect's Blue Star's~~ review and Owner's approval. If the ~~Architect~~, Architect, Owner's Engineering Consultants, Blue Star, the Owner, or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 ~~As the Architect progresses~~ Throughout the Preconstruction Phase, the Construction Manager will review and monitor the various phases of the development of the design documents to determine whether or not the project budget remains realistic at each phase of the development of the design documents by the Architect and Owner's Engineering Consultants. As the Architect and Owner's Engineering Consultants progress with the preparation of the Schematic Design, Design Development and Construction Documents, ~~Documents (for any phase of the Project if the Work has been broken down into Phases in accordance with the Contract Documents)~~, the Construction Manager shall prepare and update, at the conclusion of the Schematic Design and Design Development phases and at such other appropriate intervals required by the Contract Documents or as otherwise agreed to by the Owner, Construction Manager and ~~Architect, Blue Star~~, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for ~~the Architect's review and review by the Architect, Blue Star, and Owner's Engineering Consultants (as applicable) and for the Owner's approval.~~ The Construction Manager shall inform the Owner and ~~Architect~~ Blue Star when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

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§ 2.1.7 The Construction Manager shall prepare, for ~~the Architect's review and review by the Architect, Blue Star, and Owner's Engineering Consultants and for the Owner's acceptance~~, a procurement schedule for items that must be ordered well in advance of construction, construction (the "Procurement Schedule") which shall include a description of the items to be ordered and the required order dates in order to avoid delay to the schedule of the Work. Owner may supplement the Procurement Schedule by written notice to the Construction Manager and the Construction Manager shall amend the Procurement Schedule to reflect such items and set out the required order dates. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. ~~If the Owner agrees to procure~~ Procurement prior to the parties' execution of the GMP Amendment shall be accomplished by Work Authorization Amendment entered into pursuant to Section 2.1.4.2 above and Section 2.2.10 below. If the Owner elects to procure directly any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions acceptable to the Construction Manager, reasonably acceptable to the Construction Manager, and the cost of such items shall be included in the GMP Proposal. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all such contracts for these items to the Construction Manager and the cost of such items shall be included in the GMP Proposal, and the Construction Manager shall thereafter accept responsibility for them.

...

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with ~~applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.~~ Applicable Laws as defined herein, but the Construction Manager shall promptly report ~~to the Architect in writing to the Architect, Owner's Engineering Consultants (to the extent of a nonconformity in their design documents), Blue Star, and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect or the Owner's Engineering Consultants (with regard to their respective design documents) may require.~~

...

The Construction Manager shall comply with ~~applicable laws,~~ all Applicable Laws as defined herein, including but not limited to statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be

required by governmental and ~~quasi-governmental~~ quasi-governmental authorities for inclusion in the Contract Documents. Construction Manager's obligation for compliance shall also apply to changes in or additions to Applicable Laws effective as of the time of the Construction Manager's respective performance, subject to Construction Manager's right to make a claim for a change in the Contract Time pursuant to Section 8.3 of the General Conditions or an increase in the Contract Sum to the extent Construction Manager can establish that it incurred additional Cost of the Work arising from the change in or addition to Applicable Laws.

§ 2.1.9.1 M/WBE Requirements. Without limiting the foregoing, Construction Manager shall comply with all M/WBE and/or Small Business or other Disadvantaged Business requirements as provided in the Owner's solicitation documents in connection with the selection of the Construction Manager for the Project or as otherwise adopted by the Owner for the Project prior to the execution of the GMP Amendment and shall meet such M/WBE and/or Small Business or other Disadvantaged Business participation goals as established by the Owner for the Project or exercise good faith efforts to do so.

§ 2.1.9.2 Prevailing Wages. Attention is called to the Government Code, Chapter 2258, Prevailing Wage Rates. Among other things, this Article provides that it shall be mandatory upon the Construction Manager and upon any Subcontractor under him to pay not less than the prevailing rates of per diem wages in the locality at the time of construction to all laborers, workmen, and mechanics employed by them in the execution of the Contract. A Construction Manager or Subcontractor who violates the provisions of Chapter 2258, Government Code, shall pay to Owner, in addition to such other sums for which the Construction Manager is liable under the statute, the sum of Sixty Dollars and No/100 (\$60.00) for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rate stipulated in the scale of prevailing wages applicable to this Project, as required by Texas Government Code Section 2258.023(b).

Except as may otherwise be set out in the Agreement, the applicable prevailing rate of per diem wages for each respective craft or type of worker performing work by or through the Construction Manager (including workers of Subcontractors of all tiers) pursuant to the Contract and the prevailing rate for legal holiday and overtime work shall be the respective prevailing wage rates for [REDACTED] as determined by the United States Department of Labor in accordance with the Davis-Bacon Act (40 U.S.C. Section 276a *et seq.*, as currently amended.

2.1.10 VALUE ANALYSIS [VALUE ENGINEERING]

Construction Manager will provide on-going value analysis studies on construction systems and major construction components, including but not limited to the mechanical system, exterior envelope, structural system, roofing system, lighting and power service. The value analysis will be summarized in report forms and distributed to the Owner, Blue Star, the Architect, and the Owner's Engineering Consultants (with regard to their respective design documents).

§ 2.1.11 SENIOR PROJECT PERSONNEL

Construction Manager has identified to the Owner its Senior Project Personnel, including the Construction Manager's Project Manager who will be responsible for the Project, and all full-time supervisory personnel for the Project, including the superintendent, and their respective reimbursement rates (for salaries and benefits) as set out in **Exhibit C (Construction Manager's Personnel Rates Schedule)**. Construction Manager shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by the Owner, Construction Manager shall not remove or replace the persons or entities assigned to the Project except with the Owner's written consent, which consent shall not be unreasonably withheld. Construction Manager shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Construction Manager shall promptly update Owner in writing with the list of persons and consultants if they change during the course of the Project.

§ 2.2 ~~Guaranteed Maximum Price Proposal and Contract Time~~ GUARANTEED MAXIMUM PRICE PROPOSAL

~~§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager No later than thirty (30) days after receipt of written request from Owner or as otherwise agreed by the parties, the Construction Manager shall prepare a Guaranteed Maximum Price proposal (the "GMP Proposal") in a form approved by the Owner for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee. GMP proposal shall be computed as the sum of the following:~~

- a. the Construction Manager's Estimated Cost of the Work (as approved by the Owner) which consists of the sum of the guaranteed or fixed prices of the Work, including those items procured by the

Construction Manager pursuant to Section 2.1.7 above, and the reasonable, good faith estimate of the cost of the balance of the Work;

- b. a deductive amount for any savings incurred for bought-out, completed or partially completed Work included in duly executed Work Authorization Amendments approved prior to establishing the Guaranteed Maximum Price;
- c. the Construction Manager's Contingency pursuant to (and as limited by) Section 2.2.4 below;
- d. the Construction Manager's Fee in accordance with Section 5.1.1 below; and
- e. Allowances as approved by the Owner.

The Owner and Blue Star shall be entitled to full access to all details of the process of developing the GMP Proposal. It is the intent of this Agreement that allowances, assumptions, clarifications, and any other loose elements that could lead to change orders after the Guaranteed Maximum Price is determined be held to a minimum. It is also the intent of this Agreement that all applicable elements of the Project be the subject to the trade contractor and subcontractor selection requirements of Chapter 2267 of the Texas Government Code (located at Chapter 2269 after September 1, 2013).

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, Architect or the Owner's Engineering Consultants (with regard to their respective design documents), the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the ~~Guaranteed Maximum Price proposal~~ GMP Proposal a written statement of its basis, which shall include the following:

- ~~1~~ a. A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- ~~2~~ A b. A detailed list of the clarifications and assumptions made by the Construction Manager in the preparation of the ~~Guaranteed Maximum Price proposal~~ GMP Proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- c. A list of allowances and a statement of their basis;
- ~~3~~ d. A statement of the proposed Guaranteed Maximum Price, broken down into a Schedule of Values (in compliance with the requirements of Section 7.1.5 below), including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- ~~4~~ e. The anticipated ~~date~~ dates of Substantial Completion and Final Completion upon which the proposed Guaranteed Maximum Price is based; based (or the date required for each if such required date has been incorporated into the Contract prior to the submission of the GMP Proposal) and those Critical Milestones identified by the Owner; and
- ~~5~~ f. A date by which the Owner must accept the Guaranteed Maximum ~~Price~~ Price (such date being no less than sixty days after submission of the GMP Proposal to Owner).

In the GMP Proposal, the Construction Manager shall also identify which Drawings and Specifications the Construction Manager contends will require revision in order to reflect the Construction Manager's proposed assumptions and clarifications and describe in detail the revisions to Drawings and Specifications which Construction Manager contends will be necessary if such assumptions and clarifications are agreed upon per Subparagraph 2.2.8.

Except as otherwise agreed in writing by the parties, Construction Manager shall prepare and submit its GMP Proposal to the Owner within thirty (30) days following the issuance of Construction Documents for the Work sufficiently complete to allow the Construction Manager to "Buy-Out" the Work (subject to allowances, assumptions, and qualifications reasonably proposed by Construction Manager and agreed by Owner).

§ 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. It is understood and agreed that the Guaranteed Maximum Price for the Work shall include a Construction Manager's Contingency in a reasonably appropriate amount not to exceed two percent (2%) of the Estimated Cost of the Work component of the Guaranteed Maximum Price (without such Contingency) as established in the GMP Amendment (it shall not be adjusted for subsequent changes in the GMP) for the sole purpose of protecting the Construction Manager from Cost of the Work over-runs in line items in its Schedule of Values and other Cost of the Work that were not included in the Guaranteed Maximum Price. Such costs reimbursable from Construction Manager's Contingency must be costs that would be reimbursable as Cost of the Work Section 6.1 through 6.7 below. Costs that are not reimbursable under Section 6.8 below shall not be reimbursable from Construction Manager's Contingency.

It is expressly understood and agreed that, to the extent that a Change Order is warranted under the terms of this Agreement, the Construction Manager's Contingency fund is not to be utilized for unforeseen conditions for which the Owner is responsible hereunder, events of force majeure (see Section 8.3 of the General Conditions), or design changes which constitute a change in the scope of the Work and for which the Owner is responsible hereunder. Sums may be charged to the Construction Manager's Contingency only to the extent that the same have been paid or are to be paid by Construction Manager. Notwithstanding anything in the Contract Documents to the contrary, no charge shall be made against the Construction Manager's Contingency without Owner's written consent, such consent not to be unreasonably withheld.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect-Blue Star to review the Guaranteed Maximum Price proposal-GMP Proposal. In the event that the Owner and Architect-and/or Blue Star discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal-GMP Proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal-GMP Proposal in writing within the time required for the acceptance of the GMP Proposal, the GMP Proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price ("GMP Amendment") amending this Contract. The GMP Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

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§ 2.2.8 The Owner shall authorize the Architect (or the Owner's Engineering Consultants with regard to their respective design documents) to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price-GMP Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the Guaranteed Maximum Price (or the Owner's Engineering Consultants with regard to their respective design documents) of any inconsistencies between the GMP Amendment and the revised Drawings and Specifications. Specifications, and such notice shall describe in detail each inconsistency.

§ 2.2.9 The To the extent any sales, rental or use of labor, equipment or materials for the Project are subject to sales or use tax under Applicable Law, the Construction Manager shall include in the Guaranteed Maximum Price all such sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price-GMP Amendment is executed.

§ 2.2.10 As noted in Section 2.1.4, some phases of the Work may be ready for construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Project. If the Owner elects to proceed with any packages of the Work before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any phases of the Work identified by the Owner.

§ 2.2.10.1 Until a Guaranteed Maximum Price for the entire Project has been established and accepted by the Owner, the Construction Manager and Owner agree to use the Work Authorization Amendment in a mutually acceptable format to authorize work to begin based on a specified scope and a specified "not to exceed" price. The price and the scope of Work identified with each previously approved Work Authorization Amendment will be included in the Guaranteed Maximum Price at the time the Contract Documents are sufficiently complete to establish the Guaranteed Maximum Price ("GMP"), subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above. Prior to the Owner's acceptance of the Guaranteed Maximum Price for the entire Work, Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work for Construction Phase services, except as the Owner may specifically authorize in an executed Work Authorization Amendment as required herein.

§ 2.2.10.2 Except as otherwise agreed by Owner and Construction Manager, when a GMP Proposal for any portion of the Work is agreed upon by the parties pursuant to a Work Authorization Amendment, the Guaranteed Maximum Price amounts for those portions which have been previously approved by the Owner shall be combined and shall be used in pricing those portions of the Work covered by such Guaranteed Maximum Price proposals, subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above, and all separate Guaranteed Maximum Price proposals previously agreed to by the parties shall be of no further force and effect.

§ 2.2.11 GMP ADJUSTMENT FROM SUBCONTRACT BUY-OUT. *Except as otherwise expressly authorized in writing by Owner,* Construction Manager shall enter into written Subcontracts (which for purposes hereof includes a subcontract agreement covering any Self-Perform Work expressly authorized by Owner, supply agreements and purchase orders) for the respective scope of the Work with fixed pricing terms and in accordance with the requirements of the Contract Documents *no later than sixty (60) days after the GMP Proposal has been accepted.* Construction Manager shall provide Owner with copies of the respective executed Subcontracts with the pricing terms *no later than three (3) business days* after such Subcontracts have been entered into. In no event shall Construction Manager commence Self Perform Work, order materials, or permit a Subcontractor to commence its portion of the Work prior to furnishing Owner with a copy of such executed Subcontract.

The parties acknowledge that, when most of the Subcontracts covering the entire Work are entered into, but in no event less than 90 days after the GMP Proposal has been accepted, and at Owner's request, the Estimated Cost of the Work in the individual line items on which the Guaranteed Maximum Price is based shall be subject to adjustment as provided herein to reflect the fixed Cost of the Work pursuant to the Subcontracts (referred to herein as "Buy-Out"). As Buy-Out occurs, Construction Manager shall provide a proposed adjustment to the respective line items in the Schedule of Values to reflect the Cost of the Work fixed by the respective Subcontracts. To the extent that the fixed Cost of the Work is less than the Estimated Cost of the Work for a respective line item, such line item shall be reduced accordingly and the Construction Manager's Contingency shall be increased accordingly. To the extent that the fixed Cost of the Work is greater than the Estimated Cost of the Work for a respective line item, the Guaranteed Maximum Price shall not be increased, but such line item shall be increased by such amount to the extent such amounts are available from Construction Manager's Contingency or from an established "savings" from another line item (with that line item being reduced accordingly).

However, such transfer to Construction Manager's Contingency from line item "savings" achieved from Subcontract Buy-Out shall not exceed, in the aggregate of all savings transferred, 50% of the amount established in the Construction Manager's Contingency under Section 2.2.4 above. To the extent the aggregate amount of line item "savings" achieved from Subcontract Buy-Out exceeds such sum, the Guaranteed Maximum Price shall be reduced in the amount of such excess line item "savings".

The adjustments as provided herein shall be incorporated by Change Order, with any net savings reducing the Guaranteed Maximum Price accordingly.

§ 2.2.11.1 The Construction Manager shall document the actual Cost of the Work at Buy-Out as compared to the GMP Proposal and shall report this information to the Owner monthly and with Construction Manager's recommendation for selection of a bid/proposal for each subcontracting package.

§ 2.2.12 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by the Construction Manager in the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Construction Manager's estimated

Reimbursable Conditions Costs and estimated Costs of the Work organized by trade; the amount of the Construction Manager's Contingency; and the Construction Manager's Fee for the Construction Phase.

§ 2.2.13 The GMP Proposal shall allow for reasonably expected changes and refinements in the Drawings and Specifications through completion of the Construction Documents, except for material changes in scope. The GMP Proposal shall also expressly include all Reimbursable Conditions Costs and such other costs and expenses directly incurred by the Construction Manager in connection with its administration and supervision of the Work through Final Completion of the Work, regardless of whether Construction Manager achieves Final Completion within any deadlines set forth in Section 2.3.3.2 below.

§ 2.2.14 The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work covered thereby and for establishment of the Guaranteed Maximum Price. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality of material and/or workmanship shall prevail over all other interpretations.

§ 2.2.15 The GMP Proposal shall adopt and incorporate all of the terms and conditions of the Contract. Any proposed deviation from the terms and conditions of the Contract must be clearly and conspicuously identified to the Owner in writing and specifically accepted by the Owner. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by the Owner and the terms of this Agreement and Modifications thereto (other than the GMP Amendment), the terms of the Agreement and such Modifications shall control.

§ 2.2.16 Owner may accept or reject a Guaranteed Maximum Price Proposal or attempt to negotiate its terms with Construction Manager. Upon acceptance by the Owner of a GMP Proposal in writing, both parties shall execute the GMP Amendment incorporating the agreed upon terms of the GMP Proposal. If the Owner rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, the Owner may terminate this Agreement as provided in Article 10 below.

§ 2.2.17 In submitting the GMP Proposal, the Construction Manager represents that it will provide every item, system or element of Work that is identified, shown or specified in the GMP Proposal or the supporting documents, along with all necessary or ancillary materials and equipment for their complete operating installation, unless specifically excepted by the Owner. Upon Owner's acceptance of the GMP Proposal, the Construction Manager shall not be entitled to any increase in the Guaranteed Maximum Price due to the continued refinement of the Construction Documents or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project or applicable Work Package as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP, except as expressly qualified in the GMP Amendment.

§ 2.2.18 Following the Owner's acceptance of the GMP Proposal and the parties' execution and of the GMP Amendment, Construction Manager shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, the Construction Manager shall deliver a monthly status report to the Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents.

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§ 2.3.1.1 For purposes of Section 8.1.2 of A201-2007, the General Conditions, the date of commencement of the Work shall mean the date of commencement of the Construction Phase Work, or any respective portion thereof, as stated in a written Notice to Proceed issued by the Owner or as stated in the GMP Amendment.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal or the Owner's issuance of a Notice to Proceed, whichever occurs earlier (as such term is used in this Agreement) shall commence on the date as stated in a written Notice to Proceed issued by the Owner for the commencement of Work (or any portion thereof) or as expressly stated in the GMP Amendment.

...

§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Architect. Except as may be otherwise directed or approved by Owner, all Subcontracts (including purchase orders) shall be awarded pursuant to competitive bids and according to the following procedure. The procedure for obtaining such bids shall be approved by the Owner and shall comply with and be governed by the requirements of Subchapter F of Chapter 2267 of the Texas Government Code (located at Chapter 2269 of the Texas Government Code after September 1, 2013). All bids shall be opened in the presence of the Owner or its duly designated representative. The Owner shall then determine, with the advice of the Construction Manager and the Architect, Blue Star, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.1.1 If the Construction Manager intends to perform Work by its own forces (Self-Perform Work), other than supervision of the Work, or through a Related Party (as defined in Section 6.10 below), Construction Manager shall notify Owner, in writing, of such intent and how the bid pricing will be obtained (whether on the basis of a stipulated sum, unit price, or cost of the work plus a stipulated mark-up subject to a guaranteed maximum price). Construction Manager must obtain Owner's written approval prior to solicitation of bids. If Owner approves Construction Manager's request to submit pricing for Self-Perform Work or from a Related Party, Construction Manager must competitively bid as required herein for all Subcontracts; provided, however, all bids, including Construction Manager's bid (which must fully comply with all applicable requirements for bids from Subcontractors) and the Related Party's bid, shall be submitted directly to Owner (or its designated representative) and shall be opened by Owner (or its designated representative).

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and when a specific bidder (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another the Owner requires a higher bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner as provided in Section 2267.256(b) of the Texas Government Code (located at Chapter 2269 of the Texas Government Code after September 1, 2013).

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and Contract. Without limiting the foregoing, Construction Manager's subcontract and purchase order forms shall be subject to approval of Owner and shall provide that subcontractor shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents. Subcontracts shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below fee.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "related party" "Related Party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10-2-2.3.2.1.

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to regular, weekly meetings at which the Owner, Blue Star, Architect, Construction Manager and appropriate Subcontractors can discuss such matters as

procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the ~~Owner~~ Owner, Blue Star, and Architect.

§ 2.3.2.6 ~~Upon~~ At or before the execution of the ~~Guaranteed Maximum Price-GMP~~ Amendment, the Construction Manager shall prepare and submit to the ~~Owner~~ Owner, Blue Star, and Architect a construction schedule for the Work ("**Construction Manager's Progress Schedule**") and submittal schedule in accordance with Section 3.10 of A201-2007-the General Conditions. Reference in the General Conditions to the "Contractor's Progress Schedule" shall mean the Construction Manager's Progress Schedule.

§ 2.3.2.7 The Construction Manager shall record the progress of the ~~Project~~ Project in accordance with Section 3.10 of the General Conditions. On a monthly basis, or otherwise as required by Section 3.10 of the General Conditions or as agreed to by the Owner, the Construction Manager shall submit written progress reports to the ~~Owner~~ Owner, Blue Star, and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the ~~Owner and Architect~~ Owner, Blue Star, and Architect in the weekly meetings held pursuant to Section 2.3.2.5 above, a daily log containing a record for each day of ~~weather, weather for the previous week,~~ portions of the Work in progress, identification of the Subcontractors working on the site and the number of workers on site, identification of equipment on site, problems that might affect progress of the work, the work (including weather impact from the previous week), accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the ~~Owner~~ Owner, Blue Star, and Architect and shall provide this information in its monthly reports to the ~~Owner and Architect~~ Owner and Architect, in accordance with Section 2.3.2.7 above. in accordance with Section 2.3.2.7 above.

§ 2.3.2.9 The Construction Manager shall coordinate the work of the various Subcontractors and develop and maintain protocols and onsite procedures with Subcontractors that will facilitate early discovery and mitigate the impact of coordination problems and potential Subcontractor defaults that could adversely impact the cost and progress of the Work

§ 2.3.3 CONTRACT TIME

§ 2.3.3.1 The Contract Time with regard to the Construction Phase Services shall be measured from the Date of Commencement as provided pursuant to Section 2.3.1.1. It is currently intended by the parties that the Date of Commencement of the Construction Phase shall be on or about , 20 (subject to earlier commencement of a portion of that Work by Work Authorization Amendment).

§ 2.3.3.2 Time is of the essence of this Contract. The Construction Manager shall diligently prosecute the Work and achieve Substantial Completion of the Work not later than calendar days from the date of the commencement of the Work or as otherwise as set forth in the applicable Work Authorization Amendment or the GMP Amendment, subject to adjustments as provided in the Contract Documents. After Substantial Completion, the Construction Manager shall diligently continue to prosecute the Work to Final Completion and, except as otherwise expressly agreed in the GMP Amendment, shall achieve Final Completion not later than sixty (60) calendar days from the later of the Date of Substantial Completion or receipt of Owner's final "punch list."

§ 2.3.3.3 Owner retains the right to identify specific areas for early Substantial Completion sufficient to allow for installation of Owner's fixtures, furniture, and equipment, phased use or partial occupancy of the facility, or providing access to Owner's Separate Contractors or vendors for finish-out work. The parties acknowledge that a Work Authorization Amendment, the GMP Amendment, or such other Modification of the Agreement may create such milestones requiring certain phases or scopes of work to be substantially performed or completed at certain specified times. Collectively, the times required for early Substantial Completion and the milestones described above are referred to in the Contract Documents as "**Critical Milestones**". The Critical Milestones made a part of the Contract are critical elements of the Contract Time requirements under the Contract and are "of the essence" of the Contract.

§ 2.3.3.4 The Owner reserves the right to modify or revise the Critical Milestones and the Project Schedule by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall strictly comply with the notice requirements set forth in Article 15 of the General Conditions. If Construction Manager fails to provide notice as required by Sections 15.1.2 and 15.1.4 of the General Conditions within ten (10) days after receipt of Owner's notice with regard to the modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall be deemed to have waived any right to seek or recover an increase in the Contract Sum or Contract Time as a result thereof. Such change in the Contract Time requirements shall be incorporated into the Contract Documents by Change Order or Construction Change Directive if the Construction Manager wrongfully fails or refuses to execute the Change Order.

§ 2.3.3.5 In the event Construction Manager shall fall behind schedule for any reason which does not justify an extension under Section 8.3 of the General Conditions of the Substantial Completion Date or any other Contract Time requirements, Construction Manager shall, within ten (10) days after written request of Owner, develop and deliver a recovery plan to the Owner with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps Construction Manager shall take to meet the requirements of the Contract with regard to the Contract Time. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Contract Sum for the scheduled recovery efforts, except as to causes of delay to the critical path not the fault of the Construction Manager under Section 8.3 of the General Conditions. No approval or consent by the Owner or any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses which Owner may suffer by reason of such re-sequencing or the failure of the Construction Manager to meet the Substantial Completion Date or other requirements of the Contract with regard to the Contract Time.

§ 2.3.3.5.1 Owner shall additionally be entitled to direct the acceleration or re-sequencing of the Work in order to achieve completion prior to the required date for Substantial Completion or to meet any other Contract Time requirements of the Contract, and Construction Manager shall be reimbursed for the amount of the premium portion of overtime actually incurred in respect thereto and shall be entitled to an increase adjustment to the Contract Sum to the extent of the premium portion of overtime so incurred. Before proceeding with any such Owner-directed acceleration plan under this subsection, the Construction Manager shall have received the Owner's prior written approval of the plan and its anticipated not-to-exceed cost.

§ 2.3.3.6 Except as provided in the Project Schedule approved by the Owner or in Section 8.3 and Article 15 of the General Conditions, adverse weather conditions are not anticipated to impact the progress of Construction Manager's work (allowance has been made in the Project Schedule and in the Construction Manager's Progress Schedule for weather conditions, other than delay due to adverse weather conditions abnormal for the period of time). However, Construction Manager will record on a daily basis whether and how its job progress has been materially affected by such conditions. Any such day lost due to adverse weather conditions (except such delay for which Construction Manager is entitled to an extension of the Contract Time under Section 8.3 and Article 15 of the General Conditions) shall be made up by Construction Manager performing work on the ensuing Saturday or by extended hours during that week or with best efforts the ensuing Sunday, and treating such as a work day for the purpose of complying with and meeting the Construction Manager's Progress Schedule (prior to such delay) and the Contract Time requirements, including the Critical Milestones and the Project Schedule. Notwithstanding the foregoing, it is expressly understood that no application for extension of time will be made unless the critical path of the project is materially affected. The Construction Manager will provide written explanation and CPM schedule evidencing such impact has occurred. Construction Manager will notify Owner of any such delay in writing, and on a monthly basis submit a report to the Owner substantiating any days claimed to have been lost, over and above those allotted for in the Construction Manager's Progress Schedule, due to adverse weather conditions.

For purposes hereof, weather conditions are "abnormal for the period of time" to the extent that the cumulative number of days of delay to the critical path as a result of adverse weather conditions exceeds calendar days in any day period. Provided, however, no day on which substantial Construction Manager forces are able to perform critical path work on the Project for more than fifty percent (50%) of the usual workday will be counted as day of delay.

§ 2.3.3.7 LIQUIDATED DAMAGES. The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of the entire Work and to meet the completion requirements of the Critical Milestones, if any, within the Contract Time as established by the appropriate Work Authorization

Amendment, the GMP Amendment, or other Modification of the Agreement, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail, or refuse to achieve Substantial Completion of the entire Work by the date required by the Contract Documents for Substantial Completion of the entire Work or to meet the completion requirements of the Critical Milestones, if any, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager (and the Construction Manager's Surety, if any, in the case of default) agrees to pay to the Owner as Liquidated Damages, and not as a penalty or forfeiture, the sum or sums for each day of such delay as set forth below:

the sum of _____ and no/100 (\$ _____) Dollars per day for each day of delay in achieving Substantial Completion of the entire Work.

Such Liquidated Damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work or relevant portion thereof, but shall not be in lieu of any actual, direct costs incurred by Owner in supplementing, accelerating, completing, or correcting the Work resulting from Construction Manager's breach of its obligations arising under the Contract, including all design and consulting costs also arising therefrom. The Owner may deduct Liquidated Damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any Liquidated Damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Construction Manager.

In no event will the total amount of Liquidated Damages exceed the sum of \$ _____.

§ 2.3.3.7.1 To the extent that the parties enter into a Work Authorization Amendment for a portion of the Work, the parties may agree therein to a required Substantial Completion Date for such portion of the Work and separate Liquidated Damages for the Construction Manager's failure to achieve Substantial Completion of such portion of the Work within the Contract Time requirements provided therein.

§ 2.3.4 THE WORK OF THE CONTRACT

§ 2.3.4.1 The Construction Manager shall fully execute the Work described in the Contract Documents or reasonably inferable by the Construction Manager as necessary to produce the results indicated by the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

§ 2.3.4.2 The Construction Manager shall perform the Work at the location or locations described in the **Project Site Description** attached hereto as **Exhibit A** (the "Project Site"). The Construction Manager shall confine its operations and restrict its staging and storage of machinery, equipment, and materials to those areas within the Project Site or to such other areas authorized in writing by the Owner or permitted by the authorities having jurisdiction for those improvements required in the public way (the "Project Boundaries/Staging Areas Plan"). On or before submitting its GMP Proposal to Owner, Construction Manager shall furnish Owner with its proposed Project Boundaries/Staging Areas Plan for Owner's approval. Except with Owner's written approval, no Work shall commence on the Project Site prior to the Owner's approval, in writing, of the Construction Manager's Project Boundaries/Staging Areas Plan. Construction Manager shall not encumber the Project Site and adjacent areas with any materials or equipment and shall arrange and maintain its materials and equipment in an orderly manner so that Owner's Separate Contractors shall have free and unimpaired access to and within the Project Site and any construction occurring there and in adjacent areas.

§ 2.3.4.2.1 The Owner reserves the right to make reasonable modifications or revisions to the Construction Manager's Project Boundaries/Staging Areas Plan by written notice to Construction Manager or by a Modification of the Agreement and **Exhibit A** attached hereto. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Construction Manager's Project Boundaries/Staging Areas Plan, the Construction Manager shall strictly comply with the notice requirements set forth in Section 15.1.2 of the General Conditions.

§ 2.3.4.3 The Construction Manager shall furnish only skilled and properly trained staff for performance of the Work. The key members of the Construction Manager's staff shall be Construction Manager's Senior Project Personnel

identified under Section 2.1.11 above and in the **List of Designated Representatives and Contact Persons [including Construction Manager's Senior Project Personnel]** attached hereto as **Exhibit B**, and such other persons agreed upon with the Owner, any such agreement not to be unreasonably withheld. Such key members of the Construction Manager's staff shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer, or termination of employment with the Construction Manager. Without limiting the foregoing, during the performance of the Work, the Construction Manager shall keep a competent superintendent at the Project site at all times, fully authorized to act on behalf of the Construction Manager. Notice from the Owner to one of Construction Manager's designated representatives identified in **Exhibit B** in connection with defective Work or instructions for performance of the Work shall be considered notice of such issues to the Construction Manager.

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Section 3.12.10 of ~~A201-2007~~ the General Conditions shall apply to both the Preconstruction and Construction Phases.

...

Section 10.3 of ~~A201-2007~~ the General Conditions shall apply to both the Preconstruction and Construction Phases.

...

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and site requirements. Construction Manager shall immediately give written notice to Owner upon each determination by Construction Manager that any of the 'full information' referenced in the immediately preceding sentence is not being timely provided by Owner, with such notice detailing what information is not being timely provided.

§ 3.1.2 Prior to the execution of the ~~Guaranteed Maximum Price-GMP~~ Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under ~~the Contract~~, the Contract, to the extent required for compliance with Section 56.054 (e) of the Texas Business & Commerce Code. Thereafter, the Construction Manager may only request such evidence if ~~(1) the Owner fails to make payments to the Construction Manager as the Contract Documents require, (2) a change in the Work materially changes the Contract Sum, or (3) the Construction Manager identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. Sum or to the extent Owner is otherwise required to provide such information by Applicable Law.~~ The Owner shall furnish such evidence as a condition precedent to commencement or continuation of ~~the Work or the portion of the Work affected by a material change.~~ After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction ~~Manager and Architect.~~ Manager.

§ 3.1.3 The Owner ~~shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1.1, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and quality.~~ has established an overall budget for the Project, based on consultation with the Construction Manager and Architect, which shall include contingencies, as determined in Owner's sole discretion, for changes in the Work and other costs which are the responsibility of the Owner.

§ 3.1.4 Structural and Environmental Tests, Surveys and Reports. During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. ~~The~~ Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager

shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by ~~law~~ Applicable Law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

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§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Owner shall be obligated to furnish only those items described in Paragraph 3.1.4 and its subparagraphs as are reasonably necessary.

...

~~The Owner shall identify a representative authorized~~ Owner's designated representative(s) for the Project is (are) set forth in the List of Designated Representatives and Contact Persons attached hereto as Exhibit B and incorporated fully herein. Such designated representative(s) shall have such authority to act on behalf of the Owner with respect to the Project. ~~Project as specifically set forth in Exhibit B.~~ The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201-2007, the General Conditions, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.2.1 **Legal Requirements.** The Owner shall furnish ~~all such~~ legal, insurance and accounting services, including auditing services, that it may determine to be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

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~~The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B103™-2007, Standard Form of Agreement Between Owner and Architect, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and the Architect, and any further modifications to the agreement.~~ has retained an Architect to provide those professional services described in the Agreement between the Owner and the Architect, Construction Manager will be furnished a copy of the Architect's Agreement upon request. Owner reserves the right to change the Architect at any time or to modify the terms of its contractual agreement with the Architect. Owner shall give Construction Manager reasonably timely notice of any termination or replacement of the Architect and of any material changes in its contractual agreement with the Architect that bears on the Work hereunder or the responsibilities or liabilities of the Construction Manager arising under this Contract.

...

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as ~~follows:~~ provided in this Section 4.1.

§ 4.1.2 For the Construction Manager's ~~Preconstruction Phase services described in Sections 2.1 and 2.2:~~ Pre-Construction Phase services described in the Contract Documents, including Sections 2.1 and 2.2 above, and performed prior to the commencement of the Construction Phase of the Work, Construction Manager's total compensation (including reimbursement of costs and expenses) shall be as follows:

...

Construction Manager will be paid a Pre-Construction Phase Fee in the stipulated sum of

Dollars (\$)), payable as set forth in Section 4.2 below.

~~§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within () months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted. Such Pre-Construction Phase Fee shall be Construction Manager's total compensation for the performance of Pre-Construction Phase services. Construction Manager shall not be entitled to reimbursement of costs and expenses incurred in the performance of such services in addition to the Pre-Construction Phase Fee.~~

~~§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.~~

~~§ 4.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payment for Construction Manager's Pre-Construction Phase services shall be paid as follows:~~

~~Amounts not in good faith dispute and properly billed and due to Construction Manager which are unpaid thirty (30) days after the invoice date shall bear interest as provided in Subchapter B, Chapter 2251, Texas Government Code.~~

~~§ 4.2.2 Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid () days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.
(Insert rate of monthly or annual interest agreed upon.)~~

~~—%~~

~~§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds—funds for the Construction Manager's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.~~

~~§ 5.1.1 The Construction Manager's Fee; Fee, except as limited by the Guaranteed Maximum Price, shall be as follows:~~

~~(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)~~

The Construction Manager's Fee for the entire Project (including any fee for Preconstruction Phase services) is and no/100 Dollars (\$) .00. This fee shall not be increased for any changes in the Work unless the final Guaranteed Maximum Price for the Project is in excess of and no/100 Dollars (\$) .00, in which case the Construction Manager's fee shall be increased by % of the amount by which the Guaranteed Maximum Price exceeds \$.00.

The Construction Manager's Fee shall be the Construction Manager's complete fee compensation (which includes Construction Manager's profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Sections 6.1 through 6.7 of this Agreement, shall constitute Construction Manager's sole reimbursement for indirect and direct costs and expenses, general conditions, and profit arising from or attributable to the performance of the Work as described herein.

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see Section 5.1.1 above.

~~§ 5.1.3 Limitations, if any, on a Subcontractor's reimbursable costs, as well as overhead and profit for increases changes in the cost of its portion of the Work; Work are, except as otherwise expressly approved in writing by Owner, as provided in Exhibit E – Change Order Pricing, and as follows:~~

In calculating an adjustment to the Guaranteed Maximum Price for a change in the Work, any Subcontractor mark-up (for increases) for indirect and direct overhead costs, administrative costs, and profit shall not exceed % of the Cost of the Work to be performed by such Subcontractor and markdowns for decreases shall not be less than % of the Cost of the Work to be performed by such Subcontractor.

...

~~§ 5.1.4 Rental rates for Construction Manager owned equipment shall not exceed percent (—%) of the standard rate paid at the place of the Project.~~[Intentionally deleted.]

~~§ 5.1.5 Unit prices, if any:~~[Intentionally deleted.]

...

Item	Units and Limitations	Price per Unit (\$0.00)
------	-----------------------	-------------------------

...

~~§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price GMP Amendment, as it is amended from time to time, to reflect additions and deductions by changes in the Work as provided in the Contract Documents. To the extent the Cost of the Work, together with the Construction Manager's Fee thereon, exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.~~

~~(Insert specific provisions if the Construction Manager is to participate in any savings.)~~§ 5.2.1.1 Notwithstanding any provision herein to the contrary, no Work is authorized to commence hereunder until a Guaranteed Maximum Price for that Work has been made the subject of the GMP Amendment or a Work Authorization Amendment to this Contract and a Notice to Proceed has been issued by the Owner with regard to such Work (which such Notice to Proceed may be included in the respective GMP Amendment or Work Authorization Amendment.

...

§ 5.2.3 Savings. If the allowable, final, verified, audited amount of the Cost of the incurred by the Construction Manager, together with the Construction Manager's Fee, is less than the Guaranteed Maximum Price, as adjusted in accordance with the Contract Documents, the entire difference shall be credited to the Owner and the final Contract Sum shall be adjusted accordingly.

If the total of the Cost of the Work and the Construction Manager's Fee is greater than the Guaranteed Maximum Price as modified pursuant to the requirements of the Contract, then the Guaranteed Maximum Price shall be the total amount payable by the Owner to the Construction Manager, and all costs of completing the Work in excess of the Guaranteed Maximum Price shall be paid by the Construction Manager.

~~§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201—2007, General Conditions of the Contract for Construction. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work only as provided in the Contract Documents and subject to the requirements thereof, including the timely notice requirements of Article 15 of the General Conditions.~~

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price GMP Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201—2007, the General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" "mark-up" as used in Section 7.3.3.3 of AIA Document A201—2007 the

General Conditions and the term "costs" as used in Section 7.3.7 of AIA Document A201-2007-the General Conditions shall have the meanings assigned to them in AIA Document A201-2007-the General Conditions and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of this Agreement, unless the Owner has furnished the Construction Manager with prior written approval of the form and substance of a subcontract, in which case such adjustments shall be calculated in accordance with the terms of those subcontracts and conditions of that subcontract.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of ~~AIA Document A201-2007-the General Conditions~~ shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 ~~If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly. Notwithstanding the foregoing in this Section 5.3, no change in Construction Manager's fee or overhead will be allowed for any additive or deductive change orders except as specifically provided for in this Agreement.~~

§ 5.3.6 Except as otherwise expressly provided herein or in the GMP Amendment, in calculating an adjustment to the Guaranteed Maximum Price for a change in the Work resulting in a change to the Construction Manager's Reimbursable Conditions Costs, such adjustment shall be based upon the actual estimated increase or reduction of such costs rather than a percentage or otherwise pre-determined mark-up or mark-down.

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§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through ~~6.7-6.7~~ which are directly related to the Project.

§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing ~~Guaranteed Maximum Price-the GMP Amendment~~.

...

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, ~~at off-site workshops-written approval, at off-site workshops,~~ and only to the extent such workers are actually performing Work directly related to the Project. Cost to be reimbursed will be the actual wages paid to the individuals performing the Work.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site ~~with the Owner's prior approval.~~
(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal or other offices shall be included in the Cost of the Work, identify in Section 11.5, the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work.) site, or when stationed off-site with the Owner's prior written approval, but only for that portion of their time required for and actually performing supervisory or administrative services directly related to the Project. Such rates shall not exceed those set forth on Exhibit C (Personnel Rates Schedule), unless approved in writing by Owner.

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work. Such rates shall not exceed those set forth on Exhibit C, unless approved in writing by Owner.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. Such costs shall be reimbursed at the fixed rates or with such fixed "mark-up" ("labor burden") as set forth in Exhibit C.

~~**§ 6.2.5** Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, with the Owner's prior approval.~~

§ 6.2.4.1 If a fixed rate or labor burden has been not been set forth in Exhibit C for a specific employee or employee classification, all personnel costs for such employee(s) will be subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by the Construction Manager for services performed for the Project by such employee(s). In such event, employee bonuses and/or costs associated with Employee Stock Ownership Plans (ESOP) for such employee(s) will not be separately reimbursable as Cost of the Work (i.e., must be covered by the Construction Manager's Fee).

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the ~~subcontracts~~ subcontracts properly entered into under the Contract Documents.

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§ 6.5.2 Rental charges for Construction Manager-owned or leased vehicles assigned to those personnel defined in Section 6.2.1 and 6.2.2 above, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval, fair market value of such item at the time such item was placed into use for the Project, subject to the terms and conditions of this Section 6.5.2 and at such rates as provided and limited herein.

§ 6.5.2.1 The projected usage for each piece of equipment to be rented for use on the Project and the estimated total rentals shall be considered by the Construction Manager and discussed with the Owner before the piece of equipment is rented so that an appropriate rent versus buy decision can be made. If the decision is made to purchase equipment for the Project, such purchased equipment shall be considered "job owned". At the completion of the Project, the Construction Manager shall transfer title and possession of all remaining job-owned equipment to the Owner, or Construction Manager may keep any such equipment for an appropriate fair market value credit to job cost, which will be mutually agreed to by Owner and Construction Manager.

§ 6.5.2.2 Each piece of equipment to be rented shall have hourly, daily, weekly and monthly rates) and the most economical rate available shall be reimbursed based on the circumstances of actual need and usage of the piece of equipment while it is stationed at the jobsite. When the piece of equipment is no longer needed for the work, no rental charges will be reimbursed if the piece of equipment remains at the jobsite for the convenience of the Construction Manager.

§ 6.5.2.3 The reimbursable equipment rental rates for equipment owned by Construction Manager or a Related Party shall be at rates subject to Owner's prior approval and shall not exceed 75% of the published rates based on the latest edition of "Rental Rates and Specifications" published by the Associated Equipment Distributors (AED). If the AED publication does not contain information related to the type of equipment rented, the maximum equipment rental rate shall not exceed 75% of the current competitive rental rates from local third party equipment rental companies.

§ 6.5.2.3.1 The aggregate rentals chargeable for each piece of tools or equipment owned by Construction Manager or a Related Party shall not exceed 50% of the fair market value of such equipment at the time of its commitment to the Work. The original purchase price and date of purchase of the equipment will be documented with a copy of the purchase invoice for the piece of equipment. Such aggregate limitations will apply and no further rentals shall be charged even if a piece of equipment is taken off the job and is later replaced by a similar piece of equipment. For

purposes of computing the aggregate rentals applicable to aggregate rental limitations, rental charges for similar pieces of equipment will be combined if the pieces of equipment were not used at the same time.

§ 6.5.2.3.2 Fair market value for used material and equipment as referred to in this Contract shall mean the estimated price a reasonable purchaser would pay to purchase the used material or equipment at the time it was initially needed for the Work of the Project.

§ 6.5.2.4 Rental charges for equipment not owned by Construction Manager or any of its affiliates, subsidiaries, or other Related Parties and rented from third parties for use in proper completion of the Work shall be considered reimbursable and will be reimbursed at actual costs, as long as rental rates are consistent with those prevailing in the locality. For any lease/purchase arrangement where any of the lease/purchase rental charges were charged to Owner as reimbursable Cost of the Work, appropriate credit adjustments to the Cost of the Work will be made for an appropriate pro rata share of the fair market value of the equipment at the time it was last used on the Project.

§ 6.5.2.5 All losses resulting from lost, damaged or stolen tools and equipment shall be the sole responsibility of the Construction Manager, and not the Owner, and the cost of such losses shall not be reimbursable under this Contract. However, this limitation is not intended to prevent the Construction Manager from recovering any such loss under the Builders Risk insurance furnished for the Project; to the extent such loss is recoverable.

§ 6.5.2.6 The Construction Manager shall be required to maintain a detailed equipment inventory of all job-owned equipment (either purchased and charged to Cost of the Work or job-owned through aggregate rentals) and such inventory shall be submitted to Owner each month. For each piece of equipment, such inventory should contain at a minimum (1) original purchase price or acquisition cost, (2) acquisition date, (3) approved FMV at the time the piece of equipment was first used on the job, and (4) final disposition.

§ 6.5.2.7 All costs incurred for minor maintenance and repairs are considered to be covered by the rental rates. Such costs include routine and preventative maintenance, minor repairs and other incidental costs. In addition, repairs and/or replacement of a capital nature are considered to be covered by the rental rates. Major repairs and overhauls are not considered routine and ordinary; consequently such costs are not reimbursable and are intended to be covered by the rental rates. All mileage associated with equipment is be covered in the rental rate.

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§ 6.5.5 ~~That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work. Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.~~

~~§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.~~

§ 6.6.1 ~~Premiums~~ The actual cost of premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. ~~Self insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval.~~ Contract, based upon such minimum limits for coverage as required by **Exhibit D (Insurance and Surety Requirements)** attached hereto, which rates shall be final for the duration of the Project (and only subject to adjustment for changes in the scope or duration of the Project).

The agreed premium rate for Construction Manager's coverage for General Liability, as required in Exhibit D is as follows:

_____ % of the Cost of the Work.

§ 6.6.1.1 If Construction Manager elects to purchase subcontractor default insurance (such as SubGuard insurance) in lieu of subcontractor bonds to cover the default of its Subcontractors, such subcontractor default insurance cost shall be reimbursable as Cost of the Work at the rate of _____ percent (_____ %) of the value of the subcontracts, including the purchase orders, actually enrolled in and covered by such subcontractor default insurance. Any

Construction Manager costs incurred in connection with the subcontractor default insurance program that exceeds the amount reimbursed by the Owner under the formula in this paragraph will not be reimbursable as Cost of the Work (i.e., must be covered by the Construction Manager's Fee). If Construction Manager obtains subcontractor default insurance but elects to bond a Subcontractor not covered by such insurance, the amount reimbursable as Cost of the Work for the premium cost of the bond shall not exceed the amount that would have been reimbursable had the Subcontractor been enrolled in the subcontractor default insurance as provided above.

§ 6.6.1.2 Construction Manager shall not be entitled to reimbursement of premium charges for self-insurance coverage furnished by Construction Manager, including self-insured retentions, except as otherwise expressly authorized in writing by the Owner. To the extent that Construction Manager is entitled to reimbursement for self-insurance coverage or "Contractor-Controlled" liability insurance coverage, premium costs shall be reimbursable on a pro-rata basis as a percentage of the completion of the applicable Work

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is ~~liable~~ liable under the Contract Documents, excluding, however, such sales or use taxes for which Owner is exempt under Texas law.

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§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of ~~AIA Document A201-2007~~ the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of ~~AIA Document A201-2007~~ the General Conditions or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic ~~equipment and software, equipment,~~ directly related to the Work with the Owner's prior approval.

However, any such electronic equipment identified in Section 6.6.6 will be limited to the cost of personal computer hardware, printers, fax machines, and network equipment used at the field office in the normal day-to-day administration, management and control of the Project. The aggregate charges for any such hardware shall not exceed the fair market value of the hardware at the time it was brought to the field office. If the total charges for any particular piece of hardware reach an amount equal to the fair market value, that particular piece of hardware shall be turned over to the Owner whenever it is no longer needed for the Project. If the Construction Manager elects to keep the particular piece of hardware, the Contract Sum shall be credited with a mutually agreeable amount which shall represent the fair market value of the particular piece of hardware at the time it was no longer needed for the job.

§ 6.6.7 Deposits lost for causes ~~other than the Construction Manager's~~ due to the Owner's negligence or failure to fulfill a specific responsibility of the Owner in the Contract Documents.

§ 6.6.8 ~~Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.~~ [Intentionally omitted.]

§ 6.6.9 Subject to the Owner's prior ~~approval,~~ approval and to such limitation on commuting and travel expense as provided in Section 6.6.10 below, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

§ 6.6.10 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work other than commuting expense or travel between the Construction Manager's offices and the Project Site, but only to the extent such personnel's wages for such duties are reimbursable as Cost of the Work under this Article 6. Such expenses incurred by employees of the Construction Manager not permanently stationed at the field office must be approved in advance by the Owner. Commuting expenses are specifically not reimbursable.

Note: At the current time, it is not anticipated that any such costs will be necessary to staff the Project. If, however, the Construction Manager determines that such expenses will be necessary to properly staff the Project, the Owner's advance written approval will be required before any such costs are considered reimbursable.

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§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201-2007, the General Conditions, provided that the emergency is not caused by the negligence or failure to fulfill a specific responsibility of the Construction Manager to the Owner as set forth in the Contract Documents or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors.

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, Manager or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier) and costs of repairing or correcting damage to the Work caused by the Construction Manager, or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier), provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager or contributed to by the negligence of the Construction Manager or its breach of its contractual obligations arising hereunder, and only to the extent that the cost of repair or correction is not recovered-recoverable (exercising reasonable commercial efforts) by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201-2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8:

...

- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, ~~Subcontractors~~ Subcontractors, Sub-subcontractors (of any tier), and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to comply with or fulfill a specific responsibility of the Contract;

...

- .7 Rental costs of machinery and equipment, except as specifically provided in Section 6.5.2;
- .8 Costs, other than costs included in Change Orders approved by the Owner or costs recoverable under the Contract Documents for a Construction Change Directive issued by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and
- .9 Sales, use or similar taxes imposed by a governmental authority related to the Work for which the Owner is exempt under Texas law;
- .10 Fines, penalties, sanctions or impositions assessed or imposed by any governmental body, instrumentality or tribunal arising from the fault of Construction Manager or its Subcontractors or any tier;
- .8 ~~Costs for services incurred during the Preconstruction Phase.~~ .11 Costs incurred by Construction Manager resulting from the failure of Construction Manager or its Subcontractors to coordinate their

work with that of Owner and its separate contractors, if any, after agreeing to the schedules therefor, or failure of Construction Manager to comply with directives of Owner not in conflict with said schedules; and

- .12 Subject to and as limited by Section 9.3.3 of the General Conditions, costs and expenses arising from Construction Manager's indemnity obligations, including but not limited to Construction Manager's costs and expenses in removing or defending against a mechanic's lien claim asserted against the Owner and/or its property.

§ 6.8.2 Costs to repair defective Work and other costs to comply with Construction Manager's warranty obligations under the Contract, except as may be expressly included in Section 6.7.3 above.

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§ 6.9.1 All proceeds from sale of surplus materials and equipment shall accrue to the Owner and be credited to the Cost of Work. Cash or early payment discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment and equipment, dividends or refunds on any bond including performance and payment bonds, whether provided by the Construction Manager or Subcontractors, and rebates, dividends, and refunds of any insurance premiums and deposits shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

Construction Manager shall make reasonable efforts to provide Owner with timely notice of all available discounts, rebates, refunds and returns (hereinafter referred to collectively as "discounts"). The Construction Manager shall not obtain for its own benefit any discounts in connection with the Work prior to providing the Owner with reasonable, prior notice of the potential discount and an opportunity to furnish funds necessary to obtain such discount on behalf of the Owner in accordance with the requirements of this Paragraph. In the event that Construction Manager fails to provide Owner with timely notice of the availability of any discount, such discount shall accrue to (be credited against) the Cost of the Work.

...

§ 6.10.1 For purposes of Section 6.10, the term "~~related party~~" "Related Party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "~~related party~~" "Related Party" includes any member of the immediate family of any person identified above.

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3. Construction Manager shall not subcontract with or purchase labor or materials in connection with the Work of the Contract from a Related Party without the written consent of the Owner and compliance with Section 2.3.2.1 above.

...

The In addition to the requirements set forth in Article 14 of the General Conditions, the Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting

and control systems shall be satisfactory to the Owner. The Owner ~~and the Owner's and Blue Star and their auditors~~ shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this ~~Contract~~. Contract and the Work hereunder, including but not limited to all records and back-up documentation relating to reimbursable expenses and Cost of Work items. The Construction Manager shall preserve these records for a period of ~~three~~ four years after final payment, or for such longer period as may be required by law.

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§ 7.1.1 Based upon Applications for Payment submitted to the ~~Architect by the Construction Manager~~ Owner and the Architect by the Construction Manager, on the form required or approved in writing by the Owner, including all supporting documentation as herein provided and in conformity with the requirements of the Contract Documents, and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents. On or before the 25th day of the month immediately preceding a month in which the Construction Manager will submit an Application for Payment, the Owner, the Architect (if required by the Owner) and the Construction Manager shall meet to review a preliminary draft of such Application for Payment (hereinafter referred to as a "Pencil Draw") prepared by the Construction Manager. The Construction Manager shall revise the Pencil Draw in accordance with any objection or recommendation of either the Owner or the Architect that is consistent with the requirements of the Contract Documents. Such revised Pencil Draw shall be re-submitted by the Construction Manager to the Owner as the Application for Payment due on or before the 5th day of the month immediately following the month in which the Pencil Draw was first submitted.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows: month.

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§ 7.1.3 Provided that all conditions precedent to payment set forth in the Contract Documents have been satisfied, including but not limited to such documentation as required by the General Conditions, and an Application for Payment is received by the ~~Owner and the Architect~~ not later than the 5th day of ~~a~~ the month, the Owner shall make payment of the certified amount to the Construction Manager not later than the last day of the same month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than ~~(—forty-five (45) days after the Architect receives the Application for Payment.~~

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§ 7.1.4 With each Application for Payment, the Construction Manager shall submit ~~payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager complete and accurate job cost reports prepared in accordance with Generally Accepted Accounting Procedures detailing all disbursements and payments made or actual costs incurred by Construction Manager for its Reimbursable Conditions Costs and other costs directly incurred by Construction Manager, including its costs for payrolls, petty cash accounts, and invoices on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.~~ (2) that portion of those for the period covered by the present Application for Payment. Pursuant to Section 6.11 above, Owner and its auditors shall be provided, upon written request, actual backup documentation to reflect those costs set out in the job cost reports submitted in support of each such Application for Payment. In addition to job cost reports, Construction Manager shall furnish copies of all invoices and applications for payment (with back-up documentation) submitted by Subcontractors (including suppliers) for Work performed by such Subcontractors (including suppliers furnishing materials directly to Construction Manager) during the period covered by the Application for Payment and for which payment is sought.

§ 7.1.5 Each Application for Payment shall be based on the most recent ~~schedule of values~~ Schedule of Values submitted by the Construction Manager in accordance with the Contract Documents. The ~~schedule of values~~ Schedule

of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values and any Allowances and agreed-upon Construction Manager's Contingency shall be shown as single separate items. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the Owner and the Architect may require. This ~~schedule, Schedule,~~ unless objected to by the Owner or the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment for Payment and determining the amount due for each such Progress Payment but shall not be considered as a basis for increasing or decreasing the GMP. The Schedule of Values shall not be modified or revised without the prior written consent of the Owner and the Construction Manager in each instance.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the ~~schedule of values.~~ Schedule of Values.

§ 7.1.6.1 In addition to other required items, each Application for Payment shall be accompanied by the following documentation, statements and information, all in form and substance approved by the Owner and in compliance with applicable state statutes:

- (A) a duly executed statement from Construction Manager detailing all moneys paid out or costs incurred by it on account of the Cost of the Work and for which payment is sought;
- (B) with regard to payments sought for work (labor and materials) furnished by Subcontractors (including vendors or material suppliers), Construction Manager must identify all Subcontractors for whose work payment is being sought in the Application and, in addition to providing such supporting documentation as may be reasonably required or requested by the Owner, provide, for each such Subcontractor the following information: (1) a brief description of the Work performed for which payment is being sought, (2) the agreed upon price or value of the Work, (3) the amount to be retained or withheld from the Subcontractor, and (4) the amount requested for payment to the Subcontractor;
- (C) with regard to work performed by Construction Manager or its own forces, Construction Manager must provide an accurate description of the work performed and for which payment is sought, including such supporting documentation required by this Agreement;
- (D) a statement, under oath, by Construction Manager that all bills or obligations incurred by Construction Manager, for which previous Applications for Payment have been submitted and paid by Owner, have been paid by Construction Manager, or, if some bill or obligation remains outstanding, the statement shall fully disclose the outstanding bill or obligation by stating the name of the person or entity to whom the bill or obligation remains outstanding, the amount of the outstanding bill or obligation, and the basis or reason why such bill or obligation has not been paid;
- (E) a statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Contract, other than any claim which has been fully paid and duly released or is included in the Application for Payment and fully described in subparagraph (A) immediately above, or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid;
- (F) a duly executed Waiver and Release from the Construction Manager waiving all claims for payment for the work (and claims for liens arising therefrom) covered by previously paid Applications for Payment (less identified retainage and any other identified holdbacks from payment) and waiving all

such liens or claims for payment for the work covered by the Application for Payment being submitted, conditioned only upon receipt of the payment being requested; and

- (G) duly executed Waivers and Releases from each (first-tier) Subcontractor for whom payment is being sought waiving all liens or claims for payment for the work covered by previously paid Applications for Payment (less identified retainage and any other identified holdbacks from payment) and waiving all liens or claims for payment for the work covered by the Application for Payment being submitted, to the extent of payment received.

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- ~~4~~ (A) Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in ~~the schedule of values, the~~ Schedule of Values or as otherwise provided hereinabove, not to exceed the actual cost of such Work incurred by the Construction Manager for such period, less the retainage to be withheld as provided hereinbelow. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of ~~AIA Document A201-2007; the General Conditions;~~
- ~~2~~ Add (B) If approved by Owner in advance, add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in ~~writing; writing,~~ less the retainage to be withheld as provided hereinbelow;
- ~~3~~ (C) Add the Construction Manager's Fee, less retainage of ~~percent (—%)~~ five percent (5%). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- ~~4~~ (D) Subtract retainage of ~~percent (—%)~~ five percent (5%) from that portion of the ~~Work that the Construction Manager self-performs; Construction Manager's Self-Perform Work authorized hereunder;~~
- ~~5~~ (E) Subtract the aggregate of previous payments made by the Owner;
- ~~6~~ (F) Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- ~~7~~ (G) Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of ~~AIA Document A201-2007; of the General Conditions and such other amounts, if any, for which the Owner is authorized to withhold from payment under the terms of the Contract Documents.~~

§ 7.1.8 The Owner and Construction Manager shall agree upon (1) a mutually acceptable procedure for review and approval of payments to Subcontractors and (2) the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements. Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%). Notwithstanding the foregoing, payments to Construction Manager shall be not subject to retainage for Reimbursable Conditions Costs incurred by Construction Manager and for direct purchases or rentals by Construction Manager of materials, appliances, and equipment, when such retainage is not commercially feasible.

§ 7.1.8.1 Construction Manager shall make such payments included in Construction Manager's Application for Payment to its Subcontractors within the earlier of seven (7) days after receipt of payment from Owner or such time period as required by Applicable Law, and consistent with the requirements of Section 9.6.2 of the General Conditions. Construction Manager shall not retain funds from its Subcontractors to the extent such funds have been requested from Owner and payment has been made to Construction Manager.

§ 7.1.9 Except with the Owner's prior ~~approval~~, written approval or as otherwise provided in Section 7.1.12 below, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Owner and the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

§ 7.1.11 Any reduction or release of retainage, or portion thereof, shall not be a waiver of (1) any of the Owner's rights to retainage in connection with other payments to the Construction Manager or (2) any other right or remedy that the Owner has under the Contract Documents, at law or in equity.

§ 7.1.12 Construction Manager shall be entitled to payment for materials suitably stored off the site at a location agreed upon in writing by Owner and Owner's Lender, conditioned on the following:

- a. evidence satisfactory to Owner that the stored materials are included in the coverage of insurance policies naming the Owner as a loss payee and Owner's Lender as a mortgagee and loss payee;
- b. bills of lading, invoices, and/or bills of sale satisfactory to Owner from the seller, supplier, or fabricator of the stored materials, evidencing the cost of such stored materials and that, upon payment, ownership thereof will vest in the Owner, free of any liens or claims of third parties; and
- c. verification (which may, at Owner's election, include physical inspection by Owner or its designated representative) of delivery and suitable storage of such materials in a bonded warehouse or storage yard approved by the Owner (including the Owner's approval of the terms of such storage).

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§ 7.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall not be made by the Owner to the Construction Manager ~~when~~ until all of the following conditions precedent to final payment have occurred or been fully satisfied:

- ~~1~~ (A) the Construction Manager has fully performed the ~~Contract~~ Contract, including all punchlist work except for the Construction Manager's responsibility to correct previously performed Work as provided in Section ~~12.2.2 of AIA Document A201-2007~~, 7.2.2 of the General Conditions and to satisfy other requirements, if any, which extend beyond final payment or which otherwise necessarily survive final payment;
- ~~2~~ (B) the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment, and for Payment in conformity with the requirements of the Contract Documents in such time as to give (i) to the Owner's auditor sufficient time as provided in Section 7.2.2 to complete its report, (ii) to the Architect sufficient time as provided in Section 7.2.2 for the issuance of the Architect's final Certificate for Payment, (iii) to the Construction Manager sufficient time provided for its notice of disputed amount to the auditor's report (or the deadline for such notice having passed), and (iv) to the Owner no less than seven days after the last of the foregoing to occur in order to make such final payment;
- ~~3~~ (C) a final Certificate for Payment has been issued by the Architect. by the Architect;
- (D) the Construction Manager has provided its notice of disputed amount to the auditor's report, provided written acceptance of the auditor's report, or has waived any objection to the auditor's report as provided by Section 7.2.3;
- (E) the Construction Manager has fully complied with the requirements set forth in Section 7.2.1.1 below and Section 9.10 of the General Conditions; and

- (F) any other conditions precedent to final payment expressly set forth in the Contract Documents have been satisfied.

§ 7.2.1.1 The conditions precedent to final payment, which are for the sole benefit of the Owner (and the third-party beneficiaries to this Contract, if any), and not the Construction Manager or its Surety, and which may be waived in whole or in part by Owner, in its sole discretion, shall also include the following:

(A) TO BE DELIVERED / FURNISHED PRIOR TO OR WITH THE APPLICATION FOR FINAL PAYMENT:

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:(1) With its final Application for Payment, Construction Manager shall furnish to Owner a release and waiver of the Construction Manager's lien rights and all claims for payment arising under the Contract, unconditioned with regard to all prior payments received (as identified therein) and conditioned (only) with regard the receipt of the final payment identified therein.

- (2) With its final Application for Payment, Construction Manager shall furnish to Owner a Final Bills Paid Affidavit which conforms to the provisions of the Contract and Applicable Law and which truthfully states that all bills or obligations incurred by Construction Manager through the final completion of the Work have been paid or are as expressly identified and set forth in the Affidavit. Amounts unpaid or claimed to be owed by Construction Manager (including claims asserted by Subcontractors, whether or not disputed by Construction Manager), including such amounts to be paid to Subcontractors from the final payment requested by Construction Manager, shall be fully identified in the Affidavit (by name of person to whom payment is owed or who is claiming payment and the amount owed or claimed to be due).

Such Final Bills Paid Affidavit shall include a statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Contract, other than any claim which has been fully paid and duly released or is included in the final Application for Payment or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid. Such Final Bills Paid Affidavit shall also include an express representation and warranty by the Construction Manager that Construction Manager shall pay each person or entity identified in the Affidavit the amount stated therein within ten (10) days after receipt of the funds requested in the Request for Final Payment.

- (3) Prior to or with its final Application for Payment, Construction Manager shall furnish to Owner a full, final, and unconditional release and waiver of lien and of all claims for payment arising under the Contract from each such Subcontractor who has received full and final payment prior to the submission of the Construction Manager's final Application for Payment.
- (4) With its final Application for Payment, Construction Manager shall furnish to Owner a release and waiver of lien and all claims for payment arising under the Contract from each such Subcontractor who has not received full and final payment prior to the submission of the Construction Manager's final Application for Payment, such release and waiver being conditioned only upon receipt of payment of the specified amount of the final payment owed to the Subcontractor which matches the amount disclosed to be due to or claimed by the Subcontractor in the Construction Manager's Final Bills Paid Affidavit required under Subsection (A) (2) above.

If Construction Manager and a Subcontractor have a dispute with regard to the amount of the final payment owed to the Subcontractor, such Subcontractor's conditional release and waiver of lien shall state the amount claimed by Subcontractor and the dispute fully identified in the Construction Manager's Final Bills Paid Affidavit.

(B) TO BE DELIVERED / FURNISHED AT OR BEFORE FINAL PAYMENT (AS PROVIDED BELOW):

- (1) On or prior to receipt of final payment (in sufficient time prior to final payment in order for Owner to verify Construction Manager's compliance with the requirements hereof), Construction Manager shall deliver any special guarantees or warranties required by the Contract Documents and assignments of all guarantees or warranties from Subcontractors, vendors, suppliers, or manufacturers (with the addresses and telephone numbers of those Subcontractors or other persons providing guarantees and warranties).
- (2) On or prior to receipt of final payment (in sufficient time prior to final payment in order for Owner to verify Construction Manager's compliance with the requirements hereof), Construction Manager shall have delivered to Owner three (3) complete sets and one electronic set of Record Documents, reflecting the "As-Built" conditions of the Project at final completion, including, without limitation, all warranties, manuals, instructions, reports, and other such documentation as Owner may have previously requested.
- (3) On or prior to receipt of final payment, Construction Manager shall furnish to Owner a release of claim and waiver of lien from each Subcontractor who has furnished a notice of claim in attempted compliance with Section 53.056 or 53.057 of the Texas Property Code. If such release is conditional upon receipt of payment by such Subcontractor, Construction Manager shall amend its Final Bills Paid Affidavit furnished in accordance with Subsection (A) (2) above (if necessary) to include such amount of the claim for which receipt of payment is conditioned, together with Construction Manager's representation and warranty to Owner with regard to Construction Manager's payment to the Subcontractor. If Construction Manager is unable to secure such release of claim and waiver of lien from a Subcontractor, final payment shall be conditioned upon Construction Manager bonding around such claim in accordance with Subchapter H of Chapter 53, Texas Property Code, or by providing such other security acceptable to Owner to indemnify Owner from such direct claim of payment by Subcontractor against Owner and to indemnify the property from any asserted lien claim by Subcontractor, including indemnity for legal costs to defend against and/or remove such lien claim.
- (4) Contemporaneous with the receipt of final payment, Construction Manager shall furnish a full and final, unconditional release and waiver of the Construction Manager's lien rights and all claims for payment arising under the Contract through the final completion of the Work, except for such amount, if any, in dispute with Owner under Section 7.2.3, which amount shall be clearly identified and reserved in such release and waiver. If Construction Manager has received final payment by cashier's check or by such other means as to constitute actual receipt by Construction Manager of such funds at the time of the final payment (not subject to collection or subsequent actual receipt of funds), Construction Manager shall furnish such release and waiver to Owner at the time such final payment is received by Construction Manager. Otherwise, Construction Manager shall tender such release and waiver in trust to an escrow agent or legal counsel, as mutually agreed by Owner and Construction Manager, with such release and waiver to be delivered to the Owner upon Construction Manager's actual receipt of such funds.
- (5) Contemporaneous with the receipt of final payment, Construction Manager shall furnish an amended Final Bills Paid Affidavit to reflect and fully identify any adjustments made with regard to the amount, if any, in dispute with Owner under Section 7.2.3 and adjustments arising from payment disputes with Subcontractors (see Subsection (B) (3) above) as of the date of the final payment.

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting ~~within 30 of the Work within thirty (30) days~~ after delivery of the final accounting to the ~~Architect~~ Owner by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven (7) days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment for the Work with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the ~~AIA Document A201-2007, General Conditions~~. The time periods stated in this Section supersede those stated in Section 9.4.1 of the ~~AIA Document A201-2007, General Conditions~~. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to ~~request mediation of the disputed amount without seeking an initial decision pursuant to Section 15.2 of A201-2007. A request for mediation proceed in accordance with Article 9 without seeking an initial decision, if required pursuant to Section 15.2 of the General Conditions.~~ A notice of the disputed amount shall be made by the Construction Manager ~~within 30 to the Owner within twenty-one (21) days~~ after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. ~~Failure to request mediation within this 30 day Owner's audit report.~~ Failure to submit such notice within this 21-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the ~~amount~~ amount, if any, certified in the Architect's final Certificate for Payment.

§ 7.2.4 ~~If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.~~

§ 7.2.4 Provided all other conditions to final payment have been met, the Owner's final payment to the Construction Manager shall be made within seven days after the later of: (a) twenty-one days (21) days after the date required hereunder for the issuance of the Architect's final Certificate for Payment, (b) the date Owner has received Construction Manager's notice of disputed amount to the auditor's report or the deadline for such notice has passed under Section 7.2.3, or (c) forty-five days (45) after the final completion of the Work under the Contract, other than warranty Work or replacement or repair of damaged or non-conforming Work (provided such damage or non-conformance was discovered after Substantial Completion of the Work). The amount of the final payment (less such amount in dispute under Section 7.2.3 and expressly identified and reserved by Construction Manager) shall be calculated as follows:

- .1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price as finally adjusted.
- .2 Subtract such amounts, if any, which the Architect withholds, in whole or in part, in connection with a final Certificate for Payment as provided in Section 9.5.1 of the General Conditions and such amounts to which the Owner is entitled to withhold from final payment.
- .3 Subtract the aggregate of previous payments made by the Owner for the Work.

§ 7.2.5 If, subsequent to Final Payment and at the Owner's request, the Construction Manager incurs costs described in Article 6 (and not excluded from reimbursement under Section 6.8) to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to Final Payment, but not in excess of the Guaranteed Maximum Price.

§ 7.2.6 At Owner's election, Owner may issue a joint check payable to the Construction Manager and the respective Subcontractor for the amount owed or claimed by the Subcontractor to be owed to the Subcontractor. In such case, the

Construction Manager and the Subcontractor shall unconditionally release the Owner and any lien on the Owner's property with regard to all payment due for the Work performed by the Subcontractor.

§ 7.2.7 If any Subcontractor or supplier refuses to furnish such a release or in the event that a claim for payment or lien has been asserted by a Subcontractor or supplier furnishing work to the Project, Construction Manager shall furnish a surety bond reasonably acceptable to Owner to release such claim against Owner and lien, if any, and otherwise fully comply with the Contract and Applicable Law. If the Construction Manager should fail to obtain a surety bond following the Owner's request, the Owner may, at its option, obtain the surety bond and back-charge the Construction Manager the costs of obtaining the surety bond or continue to withhold such sum as determined, in good faith, by the Owner to be reasonably necessary to protect itself from loss or damage arising from such claim.

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of ~~AIA Document A201-2007~~ the General Conditions and as set forth in the Insurance and Surety Requirements attached hereto as Exhibit D and fully incorporated herein.

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~~§ 9.1 Any Claim-claim or dispute between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201-2007. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution, and Section 9.3 of this Agreement shall not apply.~~
subject to mediation as provided in this Section 9.1.

§ 9.1.1 The Owner and Construction Manager shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement or as otherwise agreed by the parties. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§ 9.1.2 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the Dallas-Fort Worth metropolitan area, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 9.1.3 If the parties do not resolve a dispute through mediation pursuant to this Section 9.1, the method of binding dispute resolution shall be the following: litigation in a state District Court located in the County in which the Project is located or in a United States District Court of the Northern District of Texas.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201-2007

☐ Litigation in a court of competent jurisdiction

☐ Other: *(Specify)*

The provisions regarding dispute resolution shall survive completion and termination of the Contract.

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The ~~Architect~~ person or entity noted below will serve as the Initial Decision Maker (if any) pursuant to Section 15.2 of AIA Document A201 – 2007 the General Conditions for Claims arising from or relating to the Construction Manager's Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker. services:

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§ 10.1.1 Prior to the execution of the ~~Guaranteed Maximum Price GMP~~ Amendment, the Owner may terminate this ~~Agreement Contract~~ upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this ~~Agreement Contract~~, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of ~~A201 – 2007 the General Conditions.~~

§ 10.1.2 In the event of termination of this ~~Agreement Contract~~ pursuant to Section 10.1.1, the Construction Manager ~~shall be equitably~~ shall, as its sole and exclusive remedy, be compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. ~~In no event shall the Construction Manager's compensation under this Section termination consistent with any compensation terms pursuant to Section 4.1 above.~~ Notwithstanding the foregoing, the compensation under this Section shall not exceed the compensation set forth in Section 4.1.

§ 10.1.3 If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the ~~Guaranteed Maximum Price GMP~~ Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1 Take the Cost of the Work incurred by the Construction Manager for the Work to the date of termination;
- .2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work for the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase ~~services~~ services for the Work and such amounts which the Owner is authorized to withhold from the Construction Manager by Applicable Law or the Contract.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. ~~To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.~~ Construction Manager's recovery as expressly authorized under this Section 10.1.3 shall be Construction Manager's sole and exclusive remedy in the event of the Owner's termination of the Contract pursuant to Section

10.1.1 above. Notwithstanding the foregoing, the total amount to be paid by Owner to Construction Manager, including all sums previously paid, shall not exceed the Guaranteed Maximum Price.

§ 10.1.3.1 To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

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Following execution of the ~~Guaranteed Maximum Price-GMP~~ Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of ~~AIA Document A201-2007-the General Conditions.~~

§ 10.2.1 If the Owner terminates the Contract after execution of the ~~Guaranteed Maximum Price~~ Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of ~~A201-2007-the General Conditions~~ shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the ~~Guaranteed Maximum Price-GMP~~ Amendment, the amount payable to the Construction Manager under Section 14.1.3 of ~~A201-2007-the General Conditions~~ shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, ~~except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed above.~~

...

The Work may be suspended by the Owner as provided in Article 14 of ~~AIA Document A201-2007-the General Conditions.~~ In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of ~~AIA Document A201-2007-the General Conditions,~~ except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

§ 10.4 NOTE – Limitation of Damages upon Termination: Construction Manager agrees that, upon Construction Manager's termination for cause (or Owner's termination for convenience), Construction Manager's recovery for damages and lost profits, if any, for Owner's breach (or early termination), shall be limited as set forth in this Article 10 of the Agreement and in Article 14 of the General Conditions.

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§ 11.1 Terms in this Agreement shall have the same meaning as those in ~~A201-2007-the General Conditions.~~

...

Section 1.5 of ~~A201-2007-the General Conditions~~ shall apply to both the Preconstruction and Construction Phases.

...

Section 13.1 of ~~A201-2007~~ the General Conditions shall apply to both the Preconstruction and Construction Phases.

...

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this ~~Agreement. Neither the Owner nor the~~ Contract. The Construction Manager shall ~~not~~ assign this Agreement-Contract without the written consent of the ~~other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of A201-2007, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Owner.~~

Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, assign this Contract and Owner's rights hereunder as provided in Section 13.2 of the General Conditions. In addition to and without limiting its rights under Section 13.2 of the General Conditions, Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, also assign the rights arising under this Contract to any of the third-party beneficiaries to this Contract expressly identified in the Contract Documents and to any specially created entity owned or controlled by the Owner, provided such entity is or becomes the owner of the property on which the improvements are constructed pursuant to the Construction Contract.

...

ARTICLE 12 — SCOPE OF THE AGREEMENT

§ 11.5.1 Those other documents forming part of this Agreement, and incorporated herein by reference, are as follows:

Exhibit A -- Project Site Description

Exhibit B -- List of Designated Representatives and Contact Persons [including Construction Manager's Senior Project Personnel]

Exhibit C -- Construction Manager's Personnel Rates Schedule

Exhibit D -- Insurance and Surety Requirements

Exhibit E -- Change Order Pricing

§ 11.5.2 CONSTRUCTION MANAGER'S DESIGNATED REPRESENTATIVE.

The Construction Manager's designated representative(s) for the Project is (are) set forth in the **List of the Designated Representatives and Contact Persons** attached hereto as **Exhibit B** and incorporated fully herein, who shall have express authority to bind the Construction Manager and who shall render decisions and furnish information promptly when reasonably requested by Owner, so as to avoid unreasonable delay in the services or work of the Construction Manager.

§ 11.5.3 CHANGES IN WORK. As a condition precedent to an increase in the Guaranteed Maximum Price, an extension of the Contract Time, or a recovery of the Cost of Work for performing work outside the scope of this Contract, the Construction Manager must, prior to the performance of any such work, obtain the approval of the Owner in accordance with the Contract Documents. Such prior approval must be obtained by a Change Order agreed to and executed by the parties pursuant to Section 7.2 of the General Conditions or by a Construction Directive issued by the Owner pursuant to Section 7.3 of the General Conditions.

§ 11.5.4 LIMITATION OF REMEDIES FOR DELAY. Except as otherwise provided herein, extensions of time shall be the Construction Manager's sole remedy for any delay, unless the delay shall have been caused by acts constituting interference by Owner with the Construction Manager's performance of the Work, and then, only to the extent that such acts continue after the Construction Manager has provided written notice to Owner of such interference. The Owner's reasonable exercise of any of its rights or remedies under the Contract Documents, regardless of the extent or frequency, shall not under any circumstances be construed as intentional interference with the Construction Manager's performance of the Work.

§ 11.5.5 CONSTRUCTION MANAGER'S REPRESENTATIONS. The Construction Manager represents and warrants the following to the Owner (in addition to any other representations and warranties contained elsewhere in the Contract Documents) as an inducement to the Owner to execute this Agreement and the GMP Amendment (at the time the GMP Amendment is agreed to and executed by the parties):

- .1 that it will perform all Work called for hereunder in a good and workmanlike manner and in accordance with all legal requirements and the Contract Documents;
- .2 that it shall strictly comply with and satisfy all legal requirements applicable to the Construction Manager's means and methods of the Work;
- .3 that it is financially solvent, able to pay its debts as they mature and possesses sufficient working capital to complete the Work and perform its obligations hereunder;
- .4 that it possesses a high level of experience and expertise in the business administration, construction, construction management and superintendence of projects of the size, complexity and nature of the project to be constructed at the site, and it will perform the Work with the care, skill, and diligence of such a contractor;
- .5 that it is able to furnish the tools, materials, supplies, equipment, and labor required to complete the Work and perform its obligations hereunder;
- .6 that it is authorized to do business in the municipality in which the Project is located and properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the Work and the site of the Project;
- .7 that its execution of the Agreement (and the GMP Amendment) and its performance hereunder are within its duly authorized powers; and
- .8 that it understands the restrictions imposed on the handling of construction payments received by the Owner pursuant to any Applicable Law and that it will fully comply with those provisions in the handling of all payments made by the Owner to the Construction Manager pursuant to this Agreement.

The foregoing warranties are in addition to, and not in lieu of, any and all other liability imposed upon the Construction Manager by law with respect to the Construction Manager's duties, obligations and performance hereunder. The Construction Manager's liability hereunder shall survive the Owner's final acceptance of and payment for the Work. All representations and warranties set forth in this Agreement, including, without limitation, this paragraph, shall survive the final completion of the Work or the earlier termination of this Agreement. The Construction Manager acknowledges that the Owner is relying on these representations and warranties in entering into this Agreement with Construction Manager.

§ 11.5.6 RESPONSIBILITY FOR PERMITS AND FEES. Notwithstanding Section 3.7 of the General Conditions (which this provision shall supersede to the extent in conflict therewith) and except as may otherwise be agreed in the GMP Amendment, the parties shall be responsible for and pay those certain permits and fees as follows:

Owner shall obtain and pay for the building permit. Construction Manager shall be responsible for all other trade permits and inspection fees as provided in Section 3.7 of the General Conditions.

Notwithstanding the foregoing, upon Owner's request and at no increase to the GMP, Construction Manager shall provide reasonable assistance to the Owner in securing the building permit, including paying for (subject to Owner's direct reimbursement to Construction Manager outside the Contract Sum) and picking up the issued permit.

§ 11.5.7 ATTORNEY'S FEES. If any action at law or in equity, including an arbitration proceeding, is necessary to enforce or interpret the terms of the Contract, the Court or the arbitrator(s), as applicable, shall determine the prevailing party and award to such prevailing party, in addition to any other relief to which such party is entitled to recover, its reasonable attorneys' fees, expert witness fees, costs, and other reasonable expenses incurred in such proceeding.

§ 11.5.8 AUTHORITY OF ARCHITECT. Notwithstanding any contrary provision hereof or of any Contract Document, no consent, decision, determination, approval or certification to be made by Architect hereunder shall be binding upon Owner unless and to the extent agreed to in writing by Owner.

§ 11.5.9 AUTHORITY OF EACH SIGNATORY. Each signatory hereto represents that it has the authority to execute this Contract on behalf of the respective named party.

§ 11.5.10 LENDER'S REQUIREMENTS. Construction Manager shall provide, upon Owner's request, to the lender or lenders (if any) furnishing financing for the development and construction of the Project (referred to herein collectively as the "Owner's Lender") any Project information that such lender(s) or its (their) designated representatives reasonably require or any such certification that Construction Manager is obligated to provide to the Owner under the Contract Documents. The Construction Manager further agrees, upon Owner's request, to execute such documents as may be reasonably required by the Owner's Lender furnishing financing for the development and construction of the Project and which are consistent with reasonable commercial practices for the financing of a project of the size and scope of the Project, including but not limited to, the following: (a) a subordination of Construction Manager's lien rights (including an lien on removables or fixtures) to any liens of the Owner's Lender securing any obligations arising from the Project; (b) an agreement by Construction Manager to provide notice prior to suspension of the Work or termination of the Contract by Construction Manager and providing Owner's Lender with a reasonable opportunity to cure Owner's default; (c) a contingent assignment of this Agreement to the Owner's Lender in the event of a default by Owner under this Contract or under the documents creating the loan(s), provided that Construction Manager shall not be required to perform additional work for lender unless Owner's Lender has assumed responsibility for payment of such additional work; (d) an agreement by Construction Manager to certify its compliance with the requirements of the Contract Documents; and (e) an acknowledgement that no Change Order or Construction Change Directive resulting in a material increase in the Contract Time or the Cost of the Work will be effective without the consent of Owner's Lender.

§ 11.5.11 MULTIPLE ORIGINAL COUNTERPARTS. This Contract may be executed in multiple original counterparts, each of which shall be of equal dignity. Faxed or electronically scanned signatures shall be sufficient for the execution and delivery of this Contract.

§ 11.5.12 PARTIAL INVALIDITY DOES NOT INVALIDATE CONTRACT. The invalidity of any part or portion of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.

§ 11.5.13 SURVIVAL. All provisions of the Contract which by their nature survive termination of this Contract or final completion of the Work, including, without limitation, all warranties, indemnities, indemnity obligations, confidentiality obligations, and obligations to arbitrate disputes, shall remain in force and effect after final completion or any termination of the Contract.

ARTICLE 12 SCOPE OF THE CONTRACT

§ 12.1 This ~~Agreement~~ Contract represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This ~~Agreement~~ Contract may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the ~~Agreement~~ Contract: see Article 1 above.

~~1. AIA Document A133 – 2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price. This Agreement is entered into as of the day and year first written above.~~

OWNER:

By: _____

Name: _____

~~2. AIA Document A201 – 2007, General Conditions of the Contract for Construction~~

~~3~~ AIA Document E201™ 2007, Digital Data Protocol Exhibit, if completed, or the following: Title: _____

CONTRACTOR [CONSTRUCTION MANAGER]

~~4~~ AIA Document E202™ 2008, Building Information Modeling Protocol Exhibit, if completed, or the following:

By: _____

Name: _____

Title: _____

~~5~~ Other documents:

(List other documents, if any, forming part of the Agreement.)

This Agreement is entered into as of the day and year first written above.

OWNER *(Signature)*

CONSTRUCTION MANAGER *(Signature)*

(Printed name and title)

(Printed name and title)

Certification of Document's Authenticity

AIA® Document D401™ – 2003

I, Robert H. Roeder/mva, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 10:33:36 on 10/23/2013 under Order No. 7586967445_1 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A133™ – 2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

(Signed)

(Title)

(Dated)